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# The Infants Lawyer:

Or, THE &c.

# LAW

(*Both Ancient and Modern*)

Relating to

# INFANTS.

Setting forth Their Priviledges; their ſeveral Ages for divers purpoſes; Guardians and *Prochein amy*, as to Suits and Defences by them; Actions brought by and againſt them, with the manner of Declarations and Pleadings; Fines and Recoveries, and other Matters of Record ſuffered or acknowledged by them, how reverſable; Conveyances and Specialties, how bound by them or not; Contracts, Promiſes, &c.

ALSO,

Treating of Infant-Executors, Admininiſtrator *durante minori ætate*; Actions and Suits brought by them and againſt them, with the manner of Declaring and Pleading.

LIKEWISE,

Of Deviſes by and to Infants, Apprentices, Cuſtom of *London* and Pleadings, Orphans, Tryals of Infancy, Portions and Legacies, and Reſolutions and Decrees at Common Law and *Chancery* concerning the ſame.

*With an Appendix, of the Forms of Declarations and Pleadings concerning INFANTS.*

*LONDON:*

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# TO THE READER.

IT is a frequent Saying in our Law-Books, *De minimis non curat Lex*, which is true if it be underſtood of petty Things and minute Circumſtances, but if we apply it to Perſons, it is not ſo; for it is moſt certain that our Law hath a very great and tender Conſideration for Perſons naturally diſabled, and eſpecially for *Minors*. The Law protects their Perſons, preſerves their Rights and Eſtates, excuſeth their Laches, and aſſiſts them in their Pleadings. And as it is ingenuouſly obſerved in *Holford* and *Platt*'s Caſe, 2 *Roll.* Rep. 18. *The Judges are their Counſellors, the Jury are their Servants*, (for they ought to find the Title at large in an Aſſize) *and the Law is their Guardian.* And let me add, they are under the ſpecial Aid and Protection

of his Equity, who is no leſs than Keeper of the Kings Conſcience.

It hath been computed by ſome (whoſe Genius lies that way,) That Infants make up a Third part of the Nation; which if ſo, (as the gueſs ſeems not very improbable) then I ſuppoſe a Treatiſe of this kind (and never before attempted) may be acceptable.

It is but Small, and therefore more analagous to the Subject of it; and yet the Matter is full of weight and variety.

The Method which I have uſed is, I conceive, as proper and apt as a Treatiſe of this ſort is capable of. And indeed it is the Nature of the Subject, which ought to direct the Method.

But be that as it will, it appears without either a *Parent* or a *Patron*; and therefore, as an *Orphan*, claims *pity*, and hopes for a *favourable* Conſtruction.

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THE

# THE INFANTS LAWYER.

## CHAP. I.

### *Of Infants in* Ventre ſa Mere.

*What Conſideration the Law hath of an Infant before its birth, and why. Of a Deviſe to an Infant in* Ventre ſa mere. *Of a Surrender to the uſe of an Infant in* Ventre ſa mere. *Of an Uſurpation upon an Infant in* Ventre ſa mere, *and how he ſhall be relieved. By what acts in Law Infant in* Ventre ſa mere *ſhall be bound, and by what not, as by Voucher, Deſcent, Forejudger, &c. Where a Felonious act done to the Child in the Womb ſhall be accounted Murder. Of the Writ* De Ventre inſpiciendo, *in reſpect of a* Widow *or* Feme Covert, *and the Sheriffs demeanor in it. When an Infant, as to the computation of its time in the Womb, ſhall be ſaid to be Legitimate, or not. The exact time of a Mans being at full Age.*

INcipiendum eſt ab ovo: And I ſhall in the firſt place ſhew what Conſideration is to be had of Infants before they are born, and how an Infant *en Ventre ſa mere* (*in Ventre matris*) ſtands in the Eye of the Law; as

alſo of a *Privement enſeint*, and then treat of the Writ *De Ventre inſpiciendo*, being a grave proviſion in our Law for the preventing Baſtards and Suppoſititious Births inheriting Eſtates.

Infant in *Ventre ſa mere*, how conſidered in Law, and why.

Altho' *Filius in utero matris, eſt pars viſcerum matris*, and has been look'd upon as not *in eſſe*; yet the Law in many Caſes hath Conſideration of him in reſpect of the apparent expectation of his Birth: He ſeems to have a real Eſſence, and therefore is ſomething more than a meer Fiction in Law; tho' to ſome purpoſes the Law imputes acts to and by him by way of Fiction, as an Infant in *Ventre ſa mere* may be vouched, 38 *Ed.* 3. 39.

Of a Deviſe to an Infant *en Ventre ſa mere.*

It hath been a great Queſtion in our Books, Whether a Deviſe to an Infant in *Ventre ſa mere* be good, or not? It hath been denied, but with this difference in *Simpſon* and *Southern*'s Caſe, 2 *Bulſtr.* 274. An immediate Deviſe to an Infant in *Ventr ſa mere* is void, but if it be in Remainder its good. The ſame difference is taken by *Windham* in *Snow* and *Cutler*'s Caſe, 16 *Car.* 2. B.R. That a preſent Deviſe to an Infant *en Ventre ſa mere* is void; but if it be deviſed to him when he ſhall be born its good, as was *Farmer* and *Foſſet*'s Caſe, in *Banc. Com.* 1655. A Deviſe, That if the Child, with which the *Feme* was *enſeint*, ſhould be born, he ſhall have a ſhare with the reſt, is good; for this is Executory. And the Caſe in *Dyer* 303. which is contrary, is held not to be Law, and the Roll doth not warrant that Caſe. But now its held, That

a preſent Deviſe to an *Infant en Ventre ſa mere* is good, tho' it hath been a wavering Point in all Ages; and the Words in the Statute of 34 *H.*8. *c.*5. *To Deviſe to any one perſon or perſons, do not hinder ſuch a Deviſe*; Theſe Words being put in to ſhew the power and largneſs of the Statute, and therefore not reſtrained to perſons *in eſſe*. And it hath been clearly Reſolved, A Deviſe to an Infant when he ſhall be born, or to a Daughter when ſhe ſhall be married, is good, and the Land ſhall diſcend to the Heir in the mean time. But it ſeems to be Reſolved in *Chudleigh*'s Caſe, ſuch a Deviſe is not good by the Statute of 32 & 34 *H.* 8. *Of Wills*; for thoſe Statutes do not provide for putting of Lands in Abeyance, and ſo a Conveyance to the uſe of an Infant in *Ventre ſa mere* is void; but now its held good in a Deviſe, as Executory Deviſe, 2 *Bulſtr.* 247. *Simpſon* and *Southern*, 16 *Car.*2. B. R. *Snow* and *Cutler*, *Farmer* and *Foſſet*'s Caſe, *Dyer* 303. *Siderf.* 153.

And now Eſtates are uſually ſetled in ſuch manner; not only where there is an actual *Enſeintment*; but long before, even upon a Marriage Settlement, and the Uſes ſhall riſe as they come *in eſſe*.

Its a Rule at Common Law, If the immediate Grantee be not *in rerum Natura*; and able to take by virtue of the Grant, its void preſently. But now, in caſe of Surrender of a Copyhold, tho' at the time of the Surrender the Grantee is not *in eſſe*, or not capable of a Surrender; yet if he be *in eſſe*, and capable at the time of the Admittance, it is ſufficient. *Regula.*

As a Surrender to him that ſhall be Heir to *J. S.* or unto the uſe of the next Child of *J. S.* tho' at the time of Surrender *J. S.* had no Child; yet if afterwards he hath a Child, the Child may come into Court, and compel the Lord to admit him. The Reaſon given is, becauſe the Surrender is a thing Executory, and is executed by the ſubſequent Admittance; and therefore if at the time of the Admittance he be capable to take, it is ſufficient, *Co. Copyholder.*

Of Surrender to the uſe of an Infant in *Ventre ſa mere.*

Now whether the Surrender to the uſe of an Infant in *Ventre ſa mere* be good, hath been much queſtioned, *Cro. Jac.* 376. 1 *Rol. Rep.* 109, 131. 2 *Rol. Abr.* 415, 416. 2 *Bulſtr.* 275, 274. *Simpſon* and *Southern.* Some are for it, and ſome are againſt it. I conceive the better Opinion is, That it is good, as well as a Deviſe to an Infant *en Ventre ſa mere*; but its agreed by all, That a Surrender to the uſe of *J. S.* for life, the Remainder to the uſe of an Infant *en Ventre ſa mere*, is good.

A Father at or under the Age of 21 years, by his laſt Will, or by his Deed executed in his life-time, may diſpoſe of the Cuſtody or Tuition of his Child or Children unmarried, or of Infants *en Ventre ſa mere*, to any perſon or perſons whatſoever, other than to Papiſts, and this *per Stat.* 12 *Car.* 2. *cap.* *Vide infra.*

*Privement enſeint*, and the relation to it.

If Tenant in Tail makes a voidable Leaſe, *rendant* Rent, and after takes Wife and dies *ſans Iſſue*, the Wife *privement enſeint* with a Son, and the Wife recovers Dower; ſhe, before the birth of the Son ſhall not avoid the

the Leaſe, for her Eſtate is *quodammodo* a Continuance of part of the Eſtate Tail; for ſhe ſhall be attendant for a Third part of the Services, and is in the *Per* by her Husband, 31 *Aſſ.* 26. *Dyer* 51. 7 *Rep.* 9. *Earl of Bedford*'s Caſe.

In reſpect of Uſurpation on Infant in *Ventre ſa mere.*

It was the Opinion of my Lord *Hobart*, That if an Uſurpation be had upon one in *Ventre ſa mere*, that at the next Turn after his Birth he ſhall be relieved by *Stat. W.* 2. *c.* 5. 'For (ſaith he) ſuppoſe the Heir then 'in eſſe, being a Daughter, were relievable in 'reſpect of her Nonage; were it reaſonable 'that the Son after born (to whom the 'Wrong is now done) ſhould loſe that Re-'lief? And (ſaith he) for Prelates to be Re-'lieved againſt Uſurpation in the Vacation 'of their Prelacies (as they are,) is altogether 'of the like nature and reaſon. And it is held by *Crooke*, If Land in Fee be mortgaged on Condition, if Mortgagor or his Heirs pay, &c. Mortgagor dies, leaving a Daughter Heir, his Wife *privement enſeint*, and ſhe pays the Money, and after a Son is born, ſhe ſhall retain the Eſtate; *terra tranſit cum onera.*

In reſpect of Fore-judger, to Acquittal.

In caſe of acquittal of the Tenant by the *Meſne*, where the Tenant receiveth his Acquittal in a Writ of *Meſne*; if he be not acquitted afterwards, he ſhall have a *Diſtringas ad acquietandum* againſt the *Meſne*; and if he come not, he ſhall be fore-judged by his default: But if the Daughter, the Son being in *Ventre ſa mare* be fore-judged, it ſhall bind the Son born afterwards, becauſe he

had no Right at the time of the Fore-judgment.

In respect of *Bastard-eigne* and *Mulier puisne* Discent.

A man seised of Lands in Fee, and hath Issue *bastard eigne* and *mulier puisne*, and dies; if the *Bastard* entreth and the *Mulier* dies, his Wife *Privement enseint* with a Son, and the Bastard hath Issue and dies seised, the Son is born, his Right is bound for ever: But if the Bastard dies seised, his Wife *enseint* with a Son, the *Mulier* enters, the Son is born, the Issue of the Bastard is barr'd; for there must not be only a dying seised, but a discent to his Issue. Note, This Discent differeth from other Discents; other Discents take away the Entry only of him that hath Right, and leaveth him to his Action, but the Discent bars the Right of the *Mulier*, 1 *Inst.* 224.

If the Wife be *privement enseint*, the Heir may not plead Detinue of Charters.

Where a felonious act done to the Child in the Womb, shall be Murder:

If a Woman be quick with Child, and by a Potion (or otherwise) killeth it in this Womb; or if a Man beat her, whereof the Child dieth in her Body, and she is delivered of a dead Child, this is a great Misprision, but no Murder: But if the Child be born alive, and dieth of the Potion, Battery, &c. this is Murder; for in Law it is accounted a Reasonable Creature *in rerum natura*, when it is alive.

If a Man counsel a Woman to kill a Child in her Womb when it shall be born, and after she is delivered she kills it, the Counseller is an Accessary to the Murder; and yet at the time of the Commandment or Counsel,

ſel, no Murder could be committed of the Child in *utero matris*, 3 *Inſt. p.*50,51. 7 *Rep. Earl of Bedford*'s Caſe.

*Writ* De Ventre inſpiciendo, *and the Proceedings.*

This is a Writ for the Searching of a Woman, that ſaith ſhe is with Child, and thereby withholds Land from him that is next Heir at Law, *Reg. of Writs fo.*227. 1 *Inſt. fo.*8.*b.*

*De Ventre Inſpiciendo*, and the Sheriffs proceedings thereon, in the Caſe of a Widow.

Sir *Francis Willoughby* died ſeiſed of a great Eſtate of Inheritance, having five Daughters, leaving *Dorothy* his Wife, who at the time of his Death pretended her ſelf to be with Child by Sir *Francis*, which, if it were a Son, all the five Siſters ſhould thereby loſe the Inheritance deſcended to them. They prayed a Writ *De Ventre inſpiciendo* out of *Chancery*, directed to the Sheriff of *London*, That he ſhould cauſe the ſaid *D.* to be viewed by 12 *Knights*, and to be ſearched by 12 Women in the preſence of the 12 Knights, and *ad tractand' per ubera & ad ventrem inſpiciend'*, whether ſhe were with Child, and to certifie the ſame into the *Common Bench*; and if ſhe were with Child, to certifie for how long time in their Judgments, *& quando ſit paritura.* Whereupon the Sheriff cauſed her accordingly to be Searched, and Returned that ſhe was Twenty Weeks gone with Child, and that within Twenty Weeks *fuit paritura.* Whereupon another Writ iſſued out of the *Common-Bench*, commanding the Sheriff ſafe-

ly to keep her in ſuch an Houſe, and that every day he ſhould cauſe her to be viewed by ſome of the Women named in the Writ, (Ten being named therein) and ſome to be preſent at her Delivery, and to view the Birth, whether it be Male or Female. And the Sheriff Returned, that ſuch a day ſhe was Delivered of a Daughter, *Cro.El. p.*566. *The Lady Willoughby's* Caſe.

And in the caſe of a *Feme Covert.*

The like Circumſtances and Proceedings were in *Theaker's* Caſe, *Paſch.* 22 *Jac.* 1. with this difference. *Willoughby's* Caſe was in the Caſe of a Widow, but this was in the Caſe of a *Feme Covert*, who was married within a Week after the death of her firſt Husband, who is ſuppoſed to get the Child: For here ſhe was a Feme Covert, and ſhe ought to inhabit with her Husband. They did not take ſuch a courſe as in the Lady *Willoughby's* Caſe, of taking her into the Sheriffs Cuſtody, but left her with her Husband, he entring into a Recognizance, that ſhe ſhould not remove from the Houſe wherein they inhabited, and that one or two of the Women might ſee her every day, and two or three be preſent at her Travel. For it was ſaid, That this Iſſue might be well ſaid to be the Child of the firſt Husband, and ſhould inherit the Land. And after this courſe obſerved ſhe was delivered of a Female Child, who was afterwards by inquiſition found to be the Daughter and Heir of the firſt Huſband, *Cro. Jac. p.*685. *Theaker's* Caſe.

Infant

Infant was Born 40 Weeks and 10 Days after the Death of the Husband, and was, held Legitimate. So Adjudged in the Case of Dr. *Andrews*, who died of the Plague upon conference with Physicians: And the Doctors held, That 20 Days backward, &c. or 20 Days forward, doth not take away Legitimation, tho' 40 Weeks is the *Tempus constitutum*, *Palmer* 9. Computation of the time in the Womb.

And in *Alsop*'s Case, the Wife after 40 Weeks and 8 Days, was delivered of a Daughter. By the Doctors, it may be Legitimate; for as well *Antenatus* might be Heir in a Child born at the end of 7 Months, so a *Postnatus* actually born after 40 Weeks: And they held, a Child may be Legitimate, tho' it be Born the last day of the 10*th* Month after the Conception, accounting the Months *per menses Solares*, not *Lunares*, *Godb.*281. 1 *Roll.*356. 2 *Cro.*541. *Alsop* and *Stacy*.

*H.* born on the 16*th* day of *February* 1608, is on the 16*th* day of *February* 1629 One and twenty years of Age; and in whatever Hour of the day he was born is not material, there being no Fraction of days. But in *Siderfin*, in the same Case, the accounting of the Age, the Day of the Birth shall be reckon'd exclusive: As if one is born the 15*th* of *February* (this Month 21 years,) he is of full Age the 14*th* of *February*. The exact time of a man being at full Age.

As to a Suppositious Birth, I shall cite you at large *Buckworth*'s Case out of *Siderfin*'s Reports, because its remarkable, and of late I have heard it often mentioned. The Case was this:

this: Information was exhibited againſt *B.* and others for Perjury, and others for Subornation. Mr. *Dormer* being Tenant for Life of ſeveral Lands in *Lincolnſhire*, with Remainder to his firſt Son in Tail, and ſo to his firſt Daughter, &c. took Wife, and they came to *London* and were Lodgers in *Chancery Lane*, where *Dormer* dies; but about the time of his death his Wife ſaid, ſhe was delivered of a Child, which was a Daughter. There was a Trial in B. C. between the Infant and he in Remainder; the manner of the Delivery of the Infant was proved by Circumſtances and by Marks, the Infant being ſtript in Court. But *B.* who was the Midwife, gave in Evidence, That this Infant was not the Child of the ſaid Woman, but of a poor Womans in St. *Giles's*, which was procured by *Dormers* Wife, and bought for 2 *s.* 6 *d.* by the Midwife, and by appointment the Infant was to be privately brought to *Dormers* Wife, and then there was to be an Outcry, and the Infant was put into her Boſom and drawn out by the Thighs when the Woman came to the ſuppoſed Labour, and that there was a bladder of Blood and Lambs Appurtenances provided, and ſhewed to thoſe which came to the Labour. And for giving this Evidence *B.* was indicted for Perjury; and the Circumſtances to prove her guilty was the cutting the Navel-ſtrings, the colour of the Skin of the Infant, &c. and that *B.* had ſeveral Sums of Fifty Pounds, &c. given to her by the direction of *G.* who was next in Remainder. On the other ſide there was

the

he poor Woman and others, that ſaid, That he Midwife had her Child at this time, nd that no account could be given of the Child, unleſs this were the Child: And here was great Proof, That the poor Woman, after her Child was Chriſtned at St. *Giles's*, gave it to the Midwife; and it appeared that Money was given to the Witneſſes on both ſides. And the Jury acquitted the Defendants of Perjury, and the parties were left at Law to try their Right. And after, 21 *Car.* 2. there was a Trial at Bar for theſe Lands by a *Lincolnſhire* Jury, nd Verdict *pro Querente*, (*viz.*) That this was a Suppoſititious Child, *Siderfin p.* 378, *The King* and *Buckworth and Others.*

CHAP.

## CHAP. II.

### *Priviledges of Infants.*

*Infant more favoured at Common Law than* Feme Covert, *and why. The Law protects the Persons of Infants: They are not to be amerced except in Special Cases; not to be imprisoned. How the Law protects the Estates and Rights of Infants. By what Judgments an Infant shall be bound, or not. Pledges where not to be found. The Reason of finding Pledges in Actions. He is capable of an Office and how. After surrender of Copyhold, he may Enter at full Age. All Judgments are in full manners. By what default Infant shall be bound, or not; and by what Confession, or not. In what Cases Laches shall be prejudicial to the Infant, and in what not. Infant not priviledged in Cases of Contempt. At what Age he may be Outlawed. Not Priviledged in cases of Criminal Actions and Torts, to the person or Estate of another. He is not Favoured in cases Of Rents, Services, Tenures, Conditions and Charges on Lands; nor in cases of Publick Offices. Of Conditions in Law, and how an Infant shall forfeit or not. Lapse shall incur against him, if he Present not within 6 Months. He is not Favoured in point of the publick quiet of mens Freehold, not in case of Prerogative. How he is bound to the Custom of the Manor or Place, or not. By what Acts of Parliament Infants are bound, or not.*

OUr Common Law looks upon Infancy as an Age of Impotence, Weakness and Disability, not capable of managing their Con-

Concerns with Diſcretion, and for their better profit and advantage; and therefore is very favourable to them in preſerving their Rights and Eſtates, inabling them in their Suits, aſſiſting them in their Pleadings, excuſing their Laches, and in protecting their Perſons. In ſhort, as it is expreſſed in *Holford and Platt's* Caſe, 2 *Rolls Rep.* 18. The Judges are their Counſellors, the Jury are their Servants, for they ought to find the Title at large in an Aſſize, and the Law is their Gardian, 2 *Roll. Rep.* 18. 5 *Ed.* 3. *per Stat.*

Now Infants and Feme Coverts, as to the diſability of their perſons are generaly ranked together. But my Lord *Hobart* in *More and Huſſey's* Caſe, *fol.* 95. ſaith, That Infants are more favoured at Common Law then Feme Coverts; and that Coverture was not at Common Law ſo far protected as was Infancy, and ſome other diſabilities as *non ſane memorie, ouſter le mere, &c.* As for inſtance, upon the *Stat.* 21. *Ed.* 1. which is, if in Aſſize the Tenant pleads Joyn-tenancy with a Stranger, who being called in and maintains it, and it be found falſe, he ſhall be impriſoned a year. In 21 *Aſſ. pl.* 28. Aſſize was brought againſt the Husband, who pleads Joyn-tenancy with his Wife by Deed, and ſhe being called in maintained it, and it being found falſe, it was adjudged, That he ſhould be impriſoned according to that Statute; but upon *Stat. W.* 2. *c.* 21. If Infant fail in Aſſize of a Record by him pleaded, he ſhall not be thereupon adjudged a Diſſeiſor within that Law, *Hob.* 95. *More and Huſſey's* Caſe.

Infants more favoured at Common Law than Feme Coverts.

Failer of Record.

In

Proclamation.

In *Lechford*'s Caſe, 8 *Rep.* The Cuſtom of the Mannor was, That if a Copyhold diſcend to the Heir, that Proclamation ſhall be made at three ſeveral Courts, that he ſhall come in to be admitted, and if he come not in, it ſhall be forfeited to the Lord; yet an Infant ſhall not be comprehended within this Cuſtom, for he by Intendment of Law is not of diſcretion to make his claim, but in ſuch caſe Feme Covert might be, becauſe her Husband might do it; and at the Common Law a Feme Covert was ouſted of her Non-claim on a Fine, which an Infant was not, but the Statute 4 *H.* 7. 24. excepts *Feme Coverts*, 8 *Rep.* 100. *Lechford*'s Caſe.

The Law protects the perſons of Infants.

As to the favour the Law ſhews in protecting the perſon of an Infant, its generally owned, that an Infant ſhall not find Pledges, and conſequently ſhall not be amerced. Its a Rule, That in all Actions original, real or perſonal, Pledges are to be found except in two Caſes, 3 *Bulſt.*

Pledges where not to be found.

1. For the Dignity of the Perſon, as the King.

2. For the imbecillity of the Perſon, as in caſe of an Infant; but if the Infant comes to his full Age hanging the Writ he ſhall find Pledges, or be amerced. Now there are two Reaſons for the finding of Pledges. 1*ſt.* For the Party, If Judgment be given againſt the Plaintiff, the Judgment ought not to be prolonged without cauſe. 2*ly.* For the King. For that the Plaintiff hath troubled the Court without cauſe. Now the Defendant (Infant) ſhall

Reaſons for the finding of Pledges in all Actions.

ſhall not be amerced, but the Entry ſhall be *perdonatur quia Infans*, 8 *Rep.* 62. 2 *Leon.* 4, 185, 186.

He is not guilty of Felony till the Age of Diſcretion, 3 *Inſt.* 4. 5. Treaſon, Felony.

He at a 11 years of Age may be Grantee of an Office, after an Eſtate for Life *excercendum per ſe vel per ſufficientem deputatum ſuum* as *Regiſter Office*; and a Deputy is allowed always in Miniſterial Offices, to be approved of by the Judges of that Court, and as an Infant may have an Office by Diſcent as to be Steward, or Warden of the *Fleet*, &c. ſo he may by grant, *Vide plus infra. Cr. Car.* 279. *Young and Steell* 55. *b.* Office.

Infant may be a Purchaſor.

He ſhall be amerced in ſome caſes, *ſed perdonatur quia Infans, Vide infra.*

He cannot be an Approver, 3 *Inſt.* 129.

Judgdment *quod capiatur* againſt an Infant is reverſed, for an Infant ſhall not be impriſoned in this caſe. Infant is found a Diſſeiſor, ſo that he ought to be impriſoned, *ſed perdonatur quia Infans.* In caſe of Felony he ſhall be impriſoned, *Br. tit. Impriſ.* 75. 1 *Bulſtr.* 172. *Daby and Holb.* Not impriſoned.

Its ſaid generally, Statutes which give Corporal Puniſhment ſhall not extend to Infants. But 30 *Aſſ.* 18. Infant brought an Attaint, and the firſt Verdict was affirmed, and the Infant was awarded to Priſon.

He is diſabled to take a Church, *Hob.* 325.

Infant ſhall not be of a Jury, 1 *Inſt.* 157, 172.

*Note,*

*Note*, The King cannot be a *Minor*, and therefore ſhall not avoid his grant by Non-age, 5 *Rep.* 27. 7 *Rep.* 10, 12.

Eſtates and Rights of Infants protected.

As to the Protecting of his Eſtate and Rights.

It ſeems to be a Rule in Law, That an Infant cannot be protected by the Law in any caſe, but where his Right which he had while an Infant, and diſcended to him, might have been barred and interrupted by Non-claim; and ſo it is in caſe of Forfeiture. The Reaſon of the Rule is, becauſe the Law conceives he will have that knowledge to preſerve his Right when he is of full Age. *Vide plus ad hoc infra ſub titulo Fines, &c. Carter Rep.* 86. *in Smith and Painton's* Caſe.

Infant not bound to pay admittance.

If a Copyholder dies, his Heir within Age, he is not bound to come into any Court during his Non-age to pay admittance or tender his Fine, 1 *Leon. p.* 100. *pl.* 128. *Rumus and Eaves.*

May enter at full Age into Copyhold Eſtate he ſurrendred.

So an Infant, who ſurrenders his Copyhold Land within Age, may enter at his full Age, without being put to any Suit for it. Nay, if he ſurrender to another when he is within Age, its not good in *Chancery*, *M.* 9 *Jac. Hayles and Carpenter*, *Pop. Rep. p.* 39.

Leaſe by him without Licenſe no forfeiture

Infant, Copyholder in Fee, makes a Leaſe for years without Licenſe, rendring Rent, at full Age he accepts the Rent., and after *ouſts* the Leſſee, Leſſee brings Ejectment: And Judgment for Leſſee, It was adjudged. *1ſt*, That this Leaſe by the Infant without Licenſe is no forfeiture. *2ly*, Acceptance of Rent at full Age makes it good, 8 *Rept.* 44. *Noy* 92.

Licenſe

As to the Priviledges of an Infant in reſpect of Feoffments, Leaſes, Contracts, Statutes, Bonds, &c. *vide infra* under the reſpective Titles.

Judgment cannot be againſt him by Default, how to be underſtood.

It is commonly ſaid, an Infant cannot have Judgment againſt him by default. But as to that I ſhall examin it by that caſe of *Holdford and Plott*, which was learnedly argued by the Judges, and is reported in 2 *Rolls Rep.* and in *Cro. Jac.* 464. 2 *Rolls Rep.* 17. *Holford and Plott.*

In Aſſize of *Novel* Diſſeiſin, the Tenant pleads a Recovery in a former Aſſize againſt him. The Demandant Replies that he was an Infant, and avers, that he was not Terretenant at the time of the Recovery, but that *P.* was Tenant, and that it was a Recovery by default. The Replication was held by the better Opinion to be good. In this caſe the Infant cannot have Error or Attaint, and therefore he may falſify the Recovery. *Firſt*, Here is a Title and Judgment pleaded againſt an Infant, whereas his Title is not diſcovered, which ought to be done, and that might be two ways. 1. By appearance, or 2 by default. Upon his appearance in two manners, (*viz.*) upon *Confeſſion* or *Nient dedire*. If the Infant in Aſſize will confeſs, the Court ſhall not receive his Confeſſion; and if he will not plead, the Jury ſhall not enquire upon the point of Seiſin, but at large. If he make default, and ſo will not diſcover his Title, his default is *mera negligentia*, and that will not prejudice him, or it is *negligentia cum contemptu*, and is in the ſame degree

Confeſſion by Infants.

Defaults with Contempt.

gree as a departure in deſpight of the Court, as if he appear and after make default, there Judgment ſhall be given againſt him. If an Infant be eſſoined in *ſervitio Regis*, and make default in not bringing in his Warrant; ſo if he make default in a *petit cape*, theſe are defaults with Contempt, and Judgment ſhall be given againſt him. But Judgment by default in Aſſize ſhall not bind an Infant, but Judgment by Verdict or Trial ſhall bind him; but with this difference, if the Judgment be upon Appearance; but if there be not Appearance, it ſhall never bind him.

How Judgment by Verdict or Trial ſhall bind an Infant.

If Judgment be given againſt an Infant upon *Laches*, he may have a Writ of Error and alledge that he was an Infant, and it was given againſt him by default, and the other ſhall not plead in *nullo eſt erratum*, but the Iſſue ſhall be upon the Non-age; ſo in *Crok. Jac.* 64. 651. If Judgment be given againſt an Infant by default, after the default he ſhall have a Writ of Error, and reverſe the Judgment for his Non-age; and yet if an Infant after appearance make default, Judgment ſhall be given againſt him, and he ſhall not reverſe it. But in the principal caſe of *Holdford and Plott*, It was the Opinion of *Dodderidge*, That the Infant could not help himſelf by Writ of Error, becauſe the Judgment was not given againſt him upon the default, but the Aſſize was upon the default, as in 6 *Rep. Ferrer's* Caſe.

Writ of Error.

*Regularly bar in Aſſize is a bar in Action of the ſame nature. Except in three Caſes.

* By *Mountague* Chief Juſtice, Regularly a Bar in Aſſize, is a Bar in an Action of the ſame nature. But this Rule hath three exceptions

ceptions. 1. In case of a parson Prebend, or Tenant in Tail. 2. If he can from any Title. 3. If he be an Infant.

A Judgment against an Infant shall not bind him, for all Judgments are either

By { Award, Confession, Default, Trial, }

All Judgments are in four Manners.

1. Judgment by Award shall not bind an Infant, 8 *Ass. pl.* 17. he may plead a Release in Bar after the Assize awarded; so 10 *H.* 6.14. Judgment against an Infant on Account, that he shall Account, binds him not, if he do not enter into the Account.

2. Upon Confession, 9 *Ed.* 3. 38. 28 *Ass. pl.* 52. the Court will not receive his Confession. Judgment shall never be given against an Infant upon his Confession, but the Jury shall enquire at large of all Circumstances. So upon *Nihil dicit*, 2 *Roll. Rep.* 17.

3. Upon Trial by Default, 3 *H.* 6.10. *Vide supra.* And the difference.

4. Judgment upon Trial shall not bind an Infant, the Book of 33 *H.* 6. 21. That if there be a Trial by Verdict it shall bind an Infant, is to be expounded by 7 *H.* 4. 25.

In all Real Actions, Infant shall have his Age, *Vide infra sub titulo Pleadings*, several exceptions.

Infant to have his Age.

Infant cannot loſe by Default in Dower, except by Gardian. *Per Cur.* If a Writ of Dower be brought againſt an Infant, who loſeth by Default at the grand Cape; yet he may Reverſe the ſame by Writ of Error. But where an Infant appeareth by Gardian, and afterwards loſeth by Default, there he ſhall never avoid it; and if any Default be in the Gardian, the Infant ſhall Recover againſt him in a Writ of Diſceit. And if the Infant brings Aſſize by his Gardian, altho' the Infant diſavow the Suit in proper perſon, yet no Nonſuit ſhall be awarded, 2 *Leon. p.* 579. *Dyer* 104. 39 *Aſſ. pl.* 1.

Non ſuit.

*In what Caſes Laches ſhall be prejudicial to an Infant or not.*

No Laches prejudicial to Infants how to be underſtood.

The Rule, That no Laches or Negligence ſhall be adjudged in an Infant is true, where he is thereby to be barred of his Entry in reſpect of a former Right, as by a Deſcent, or of his former Right, as by a Warranty where his Entry is congeable. But otherwiſe it is of Conditions, Charges, Penalties going out, or depending upon the Original Conveyance; for Laches ſhall be adjudged in thoſe Caſes as well in the Infant as any other, *Plow. Com. Stowell's* Caſe, *per tot.* 355. *Vide* 1 *Inſt.* 380. *b.*

But if the Infant be within Age at the time of the Alienation with Warranty, and becomes of full Age before the Deſcent of the Warranty, the Warranty ſhall bar him for ever, *Vide infra tit. Acts in Law.*

But

But tho' an Infant is generally favoured in the Law, (as hath been repreſented to you) yet this favour doth not extend to all Caſes; the Conſideration whereof ſhall be the Subject of the next Section.

*In what Caſes an Infant is not favoured in the Law.*

He is not previledged in caſe of Contempt to the Court. And therefore, Judgment by Default after appearance ſhall bind him, for the Default amounts to a departure in deſpight of the Court, *Vide ſupra.* Not favoured in Contempt.

Its a General Rule, That an Infant ſhall not be amerced; and this is the Cauſe that he ſhall not find Pledges; yet we find in our Books many Caſes wherein he ſhall be amerced. As, In what Caſes he ſhall be amerced.

In a *Quare Impedit* againſt an Infant, if the Plaintiff had a Writ to the Biſhop, the Infant ſhall be armerced, 44 *Ed.* 3. *tit. Amerc.* 10.

If an Infant brings an Action, and this abates for his Infancy, he ſhall be amerced, 41 *Aſſ.* 14.

If Infant brings Action by *Prochein Amy*, and hanging the Action, comes of full Age and makes an Attorney, and after is Non-ſuit, he ſhall be amerced, *Dyer* 338.

Infant brought Action of Treſpaſs by his Gardian againſt two, and the Defendants Plead Not guilty, and at *Niſi prius* the Plaintiff appears in perſon, and a Verdict is found for the Plaintiff for part, and Not-guilty for the reſidue, and one of the Defendants Not-guilty.

Judgment is given for the Plaintiff, for that for which the Verdict is given for him, and *quod nil capiat per billam* for the residue, and him that is found Not guilty, *sed nihil de misericordia pro falso clamore, &c. quia querens tempore transgressionis præd' factæ infra ætatem existebat*; yet this is good, and no Error, and the Court took a difference between this and a Non-suit.

But pardoned.

But when a Infant is amerced, he shall be pardoned of Course.

May be Outlawed.

Infants above the Age of 14 may be Outlawed, for this is a flying from the Law, and no reason he should be favoured by it.

Shall pay Cost.

Infant Lessor in Ejectment shall pay Costs, 3 *Keb.* 347.

Leygager.

Infant may not wage his Law, because he cannot make Oath, 11 *H.* 6. 40. *b.*

Not favoured in Criminal Acts.

12. In case of Criminal Actions, and Wrongs, and Injuries done to the Person, or Estate of another, an Infant shall not be priviledged, for in such cases *malitia supplet ætatem*; but then he must be of the Age of discretion.

If an Infant be Tenant by the Courtesy, or Lessee for Life or Years, he shall answer for Wast done by a Stranger, by *Stat. Gloceſt. c.* 5. If he doth Wast, and the Lessor recover in Wast, it shall bind him. 3 *Inst.* 301. 8 *Rep.* 44.

Infants or Feme Coverts, Keepers of Gaoles, shall be charged with Escapes, 2 *Jac.* 382.

3. Infant is not favoured in Cases of Rents, Tenures or Services, or other Charge upon the Land, for *transit terra cum onere*, 2 *Inst.* 11.

Infants

Infancy ſhall not excuſe the breach of a Condition. And a Condition in a Deed obligeth Infants as much as others, *Vide* 8 *Rep.* 42. *Whittingham's* Caſe. As to this between Conditions in fact, and Condition in Law: Infant is bound by all Conditions in Deed, tho' not by all Conditions in Law. *Plow. Com.* 57. is againſt it, but *Br. Cond. Pl.* 114. that Caſe is ſaid to be no Law, 1 *Vent.* 200. *Porter and Fry.*

What Act by Infant ſhall amount to a Forfeiture, *Vide infra tit. Conveyance* and *Feoffment.* An Infant may do Homage but not Fealty, becauſe that is to be done upon Oath, 1 *Inſt. lib.* 2. *cap.* Homage. In a *per quæ ſervitia* againſt an Infant, he ſhall be compelled to Attorn, for he ſhall not be prejudiced by it, becauſe at full Age he may diſclaim to hold of him, or that he held by leſſer Services; but there ſhould be a greater miſchief to the Lord, if the Attornment of the Tenant ſhould not be good, for he ſhould loſe his Services in the mean time. If an Infant be Leſſee he ſhall be compelled to Attorn in a *Quid Juris clamat*, 9 *Rep.* 125. *b. Coney's* Caſe.

If Land deſcend to an Infant, this being held in Socage he ſhall pay a Relief, and after the death of Tenant in Socage, Relief is due preſently, be the Heir of what Age he will, and though he be not paſt 14. *Doct. and Stud.* 14. *b.* 2 *Rolls Abr.* 59. 1 *Inſt.* 127.

As to other Charge, *Vide infra tit. Law Acts, Conditions, &c.*

Not to be employed in publick Offices.

4. In cases of Offices and publick Administration, an Infant shall not be employed therein, in respect of his Non-ability, to undergoe *ardua Regni* or *negotia Curiæ*. But this indeed is rather a favour to him, the Law not permitting an Infant to attempt things beyond his strength and capacity, lest *Phaeton* like, he rashly overturn the frame of Administration. He shall not be Steward of a Mannor, or Bayliff or Attorney, but he may be an Attorney to give Livery and Seisin.

Not to be Steward of a Mannor.

Infant not to be elected Knight or Burgess for Parliament, tho' it is too often done to the contrary.

He is not capable to perform grand Serjeanty at the Coronation.

Of his Forfeiture by Condition in Law. Vide 8 Rep 44.

As to Offices, of what Offices, and the Execution thereof, an Infant is capable, or not.

Its a good distinction in the first Institutes as to Conditions in Law, which are annexed to Offices. One Condition in Law is Skill and Confidence. Another Condition in Law is, That if he alien a greater Estate than he hath, its a forfeiture. Now to apply it, If an Office of Partnership be granted or descend to an Infant, or Feme Covert, if the Condition in Law annexed to this Office, which requires Skill and Confidence be not observed and fulfilled, the Office is lost for ever; for it is as strong as an express Condition. But if a Lease for Life be made to an Infant, and he by Charter of Feoffment aliens in Fee, the breach of this Condition in

in Law is no abſolute Forfeiture of his Eſtate. So of a Condition in Law given by the Statute, 1 *Inſt.* 233. *b.* 8 *Rep. Whittingham's* Caſe.

5. In caſes of publick Utility and ſafety of the Common Weals, an Infant ſhall not be favoured no more than others; his Houſe may be Blown up in caſe of a general Fire, and to ſtop the ſpreading of the Conflagration. He is bound to contribute to repair Bridges, to pay publick Taxes and the like, 2 *Inſt.* 703. Publick Safety.

And here I ſhall briefly obſerve, in and by what Acts of Parliament an Infant is bound or not. By what Acts of Parliament Infant is bound or not.

Its a Rule in *Dyer* 104. an Infant is bound by every Statute Law, if he be not excepted, as the Statute of Fore-judger, *Ceſſavit*, Fines with Proclamations, &c.

In the Argument of *Stowell and Zouch*, *Plow.* 394. It is well diſtinguiſht, that in ſome Caſes where the Statutes are general, yet they ſhall not extend to the Infants, and in ſome caſes they ſhall, *Plow.* 364. *Zouch and Stowell.*

By *W.* 2. *c.* 25. If one named a Diſſeiſor vouch a Record, and fail at the day, he ſhall be impriſoned for a year; yet if an Infant named a Diſſeiſor, vouch a Record, and fail, he ſhall not be impriſoned; for that he hath not diſcretion, and tho' he be comprehended in the Letter, yet it is not intended in the Senſe. So if a Infant is Bayliff or Receiver, and he Accounts before Auditors aſſigned, and is found in Arrearages,

ages, the Auditors may not Commit him to the next Gaol, and yet the Stat. *W.* 2. *c.* 11. is general in ſuch caſe; that they may Commit all Bayliffs and Receivers; but an Infant which had not the Age of Diſcretion was not intended to be bound by the Act. And yet an Infant ſhall be bound by the Stat. 20 *Ed.* 3. of *Reſceipts*, to put in Security according to the Statute for the value, becauſe the Security is *à Latere*, and the words of the Statute are generally *(if any.)* 33 *H.* 6. *b.*

It is ſaid in *Godb.* 80. That a General Act of Parliament ſhall bind an Infant if he be not excepted. But an Infant ſhall be bound by the Statute of *Ceſſavit* and *Waſt*, and ſuch like, tho' the Statutes are General, for the Ceſſer is an injury to the Lord, and Waſt is injurious to the Leſſor, *Plow.* 364. *b.*

Diverſity as to Conditions in Law by force of a Statute.

And there is a good difference in 1 *Inſt. p.* 233. *b.* of Conditions in Law by force of a Statute. If an Infant (or Feme Covert) with her Husband aliens by Charter of Feoffment in *Mortmain*, this is no bar to the Infant, or Feme Covert. But if a Recovery be had againſt an Infant (or Feme Covert) in an Action of Waſt, there they are bound and barred for ever.

Preſentation to a Church.

Laches ſhall be adjudged in an Infant, if he preſent not to a Church within ſix Months, for the Law reſpects the Priviledge of the Church, that the Cure be ſerved, more than the Priviledge of Infancy.

The

The Law reſpects the publick repoſe of the Realm concerning Mens Freeholds and Inheritances, before the Priviledge of Infancy in the caſe of a Fine, where the time begins in the time of his Anceſtor, *Plow.* 372. The Non-claim of a Villain of an Infant by a year and a day, who had fled into antient Demeſne, ſhall take away the Seiſure of the Infant. And if an Infant bring not an Appeal of the Death of his Anceſtor within a year and a day, he is barred of his Appeal for ever; for the Law reſpects more Life and Liberty than the Priviledge of Infancy. And ſo the Law reſpects Prerogative more than Infancy, as if the King die ſeiſed of Land, and the Lands deſcend to his Succeſſor, this ſhall bind an Infant, 1 *Inſt.* 246. *a.*

He is bound in reſpect of the publick repoſe concerning mens Freeholds.

He is bound by Prerogative.

6. By Reaſon of the Cuſtom of the Place, Manor, Court, *&c.* an Infant ſhall not be priviledged more than others. Cuſtom, That the Lord may take the Profits during the Non-age of the Infant Tenant, good, 1 *Leon.* 266.

But this is not regularly true, as in the Caſe above cited; if Heir of Copyholder come not in and pray admittance at the third Proclamation in Court, he ſhall loſe his Eſtate, this doth not extend to Infants. Neither muſt Cuſtom deprive the Law of Nature. By the Cuſtom of ſome Cities and Places, an Infant of 15 years old, (for in pleading an Age certain muſt be ſet down, and is not be left to the counting of twelve pence, or meaſuring an Ell of Cloth,

(as

(as some Books are) that so the Court may judge it an Age of discretion, for Custom must not deprive the Law of Nature) may make a Feoffment of his Lands lying there. But if such an Infant would make a Grant to the King by Deed enrolled, the Stat. of 31 *H.* 8. of Monasteries would not make it good, *Hob.* 225. *Needlers's* Case.

CHAP

## CHAP. III.

### *Of the ſeveral Ages of Infancy.*

*Of the ſeveral Ages of Infants in the Law, for ſeveral purpoſes. What is accounted the Age of Diſcretion. Of the Age for Conſent to Marry. Of full Age. When Marriage* infra annos nubiles *ſhall be ratified by Agreement, or defeated by Diſagreement. Of* Baron *and* Feme de facto. *What amounts to an Agreement. The Age of an Heir in Socage, and what he may then do. At what Age a Woman is Dowable. When an Infant may make a Will of Goods, Chattels or Lands.*

MY Lord *Hobart* hath a fine Notion in his Argument of *Needler* and *The Biſhop of Wincheſter*'s Caſe. 'The Age of One and twenty years is ſet by our Law for the Time of Full Age, and thereby Grants are perfected. 'Now (ſaith he) tho' it be true 'that the Age of 21 is not ſet for Granting 'by the Law of Nature; yet becauſe it is 'by the Law of the Land, ſet as the Term 'and Period that the Law of Nature judgeth 'of the Diſability of Minors to give or 'give or grant, all Statutes of this Land ſhall 'equally be judged in favour of Minors, 'even to that Age, in imitation of the 'Common Law, except in ſpecial Caſes, '*ſecundum quid*: As an Infant to Contract 'for

'for meer Neceſſities; and the Age of
'for the Heir in Socage; and the Age
'12 and 14 for the Marriage of the Ma
'and Female, &c. *Hob.*224.

As to the Ages of Infants in reſpect
Wardſhips, there are very many Reſolutio
in our Books, both as to their Times
Marriage, and of taking their Eſtates in
their own hands, and ſuing out Liveries a
the like: But the Statute having taken awa
the Court of *Wards*, all theſe great Titles
our Books are vaniſhed and rendred uſele
and as ſuch I ſhall not ſtand to treat
them.

Full Age. One and twenty is accounted the full Age i
our Law, and 25 by the Civil Law for then th
*Romans* accounted the man to have *plena*
*maturitatem*; and the *Lombards* counted th
Age of Eighteen to be Full Age, 1 *Inſt.*78.*b.*

Age of Diſcretion. At Fourteen years in our Law is accounte
the Age of Diſcretion, and in ſeveral caſe
at that Age an Infant ſhall be priviledged
puniſhed or chargable, as you will find i
this Treatiſe.

As for the Age of Conſent to Marry,
ſhall be more particular in that, becauſe 'ti
ſometimes a thing of Conſideration in grea
Families, where ſuch Eſpouſals are fre-
quent.

When Marriage *infra annos nubiles* ſhall be ratified by agreement, or defeated by diſagreement. Now when they marry *infra annos Nubiles*,
the time of Agreement or Diſagreement for
the Woman is at Twelve, or after, and for
the man at Fourteen, or after; and there
needs be no new Marriage, if they ſo agree;
but diſagree they cannot before the ſaid
Ages;

Ages; but then they may diſagree and marry themſelves to others without any Divorce; and if once they give Conſent, they can never diſagree after, 1 *Inſt.* 79. *a. b.* 2 *Rep.* 46, 62.

If a man at Fourteen marry a woman at the Age of Ten, at her age of Twelve he may diſagree as well as ſhe may, tho' he were of the age of Conſent; becauſe in Contracts of Matrimony both muſt be bound, or equal election of Diſagreement given to both; ſo it is *è converſo*, if the Woman be of the age of Conſent, and the Man under.

If a man marry a woman which is within the Age of Twelve years, and after the Wife diſagrees to the Marriage within the age of Twelve years alſo, and after the age of Twelve years marry with another: Now the firſt Marriage is abſolutely defeated, ſo that he may take another Wife; for altho' the Diſagreement within the age of Conſent was not ſufficient, yet her taking another Husband after the age of Conſent affirms the Diſagreement, and ſo the Marriage is void *ab initio*, as it was adjudged in the Caſe of *Babington*. But if a man marry a woman within the age of Twelve years, and after the Wife at Eleven years of age diſagrees to the Marriage, and after the Husband takes another Wife, and had Iſſue by her, this is a Baſtard; for the firſt continues notwithſtanding the Diſagreement of the woman; for ſhe may not diſagree within the age of Twelve years, and ſo her Diſagreement was void, 1 *Roll. Abr.* 341.

If

*Baron* and *Feme de facto.*

If a man within the age of Fourteen takes a Wife of Twelve, or more, this is a Marriage, and they are *baron & feme de facto*; ſo that the Husband may have Treſpaſs *de muliere abducta cum bonis viri. Trin.* 12 Jac. B. *Bradſhaw* and *Fletcher.* And if the man come to the age of Fourteen, and make any continuance of the Action, this ſhall be a good Agreement to the Marriage, ſo as it ſhall not afterwards be defeated.

What amounts to an Agreement.

If Diſagreement be before the Ordinary, then they can never after agree to make it a good Marriage, tho' within the Age of Conſent. *Quære.*

The Heir of an Heir in Socage, and what he may then do.

The Age of an Heir in Socage is Fourteen, and then he ſhall have account of his Guardian, and ſhall, if he pleaſe, chuſe a new one.

At what Age a Woman is Dowable.

A Woman is Dowable when ſhe is above Nine years of age; for then ſhe is able *promereri dotem & virum ſuſtinere.* Now this, tho' but an inchoate Marriage, to which either of the parties at the age of Conſent may diſagree, after the death of the Huſband ſhall give Dower to the Wife, and *quoad dotem* it is accounted in Law *Legitimum Matrimonium.*

If a man taketh a Wife of the age of Seven years, and after aliens his Land, and after Alienation his Wife attains to Nine years, and after the Husband dies, the Wife ſhall be endowed; for tho' ſhe was not abſolutely Dowable at the time of the Marriage, yet ſhe was conditionally Dowable, (*viz.*) if ſhe attain'd the Age of Nine years before the

the death of her Husband. And the Biſhop upon Iſſue joyned in a Writ of *Dower*, *Quod nunquam fuer' copulat' in legitimo Matrimonio*, ought to certifie that they were coupled in lawful Marriage, albeit the Man were under Fourteen, and the Wife above Nine and under Twelve, 1 *Inſt.* 33. *a.*

By the Old Law, at the age of Fifteen years a man ought to be Sworn to keep the Peace, 34 *Ed.* 3. *Stat.* 3. At Twelve years he may take the Oath of Allegiance in the *Leet*. The age of Twelve years binds to Appearance before the Sheriffs and Coroner, for Enquiry after Robberies, 52 *H.* 3. *cap.* 24. The age of Fourteen years enables to enter into Orders of Religion, without Conſent of Parents, 4 *H.* 7 *c.* 15.

When Infant may make a Will, of Goods and Chattels and Lands.

An Infant of the Age of Eighteen may make a Will as to Goods and Chattels; but not as to Lands till One and twenty: And at the age of Seventeen years, he is able to act as Executor and Adminiſtration *dur' minori ætate* ceaſeth. A Will made the day a man comes to Age is good. A man makes a Will under the Age of 21 years, and publiſheth it the ſame day he comes to Age; it is good, 1 *Keb.* 589. *Herbert*'s Caſe.

The time of full Age by computation.

Now, when a man ſhall be ſaid to be of Full age, or as to the time of Full age by computation, it is agreed in *Herbert* and *Turball*'s Caſe, 14 *Car.* 2. *Br.* that if *H.* is born the 16*th* of *February*, *Anno Dom.* 1608. he is at Full age the 16*th* of *February*, *Anno Dom.* 1629. and at whatever Hour he was born is

not material, there being no Fractions of Days in our Law. *Vide ante.*

Infant under the age of Seven years, shall not be laid to be a Wanderer within the Statute of 39 *Eliz. c.* 4. for the *Punishment of Rogues*, 2 *Bulstr.* 352.

CHAP.

## CHAP. IV.

### *Of* Guardian *and* Prochein amy.

*Four ways by which a man may Sue. The true difference between a* Guardian *and* Prochein amy; *Regularly an Infant muſt Sue by* Guardian, *and why. In what caſes he ſhall Sue by* Prochein amy. *Infant muſt appear by* Guardian, *and not by* Prochein amy. Prochein amy, *in what Caſes appointed. No Action on the Caſe againſt* Prochein amy. Guardian *to be appointed by the Court; who to be admitted. Where the Infants appearance by Attorney is Error, or not. How the Infants appearance by Attorney ſhall be tryed. Infant Executor muſt appear by* Guardian, *and why. Infant Executor may Sue by Attorney, and why: But muſt defend by Guardian. Error to be aſſigned by Guardian, and not by Attorney.* Baron *and* Feme, *the* Feme *being within Age, are Vouched; the* Feme *ought to appear by* Guardian. *The Form of the Entry of the Guardian to Proſecute. Three manner of Guardianſhips. Of Guardians at Common Law. Guardian in Socage; the Nature of him. All poſſibility of Diſcent excluded. Difference between Guardian by Socage, and Guardian by Nature. Guardianſhip, not to ſurvive to the Husband. Infant cannot be Guardian in Socage.* Stat. 12 Car. 2. 24. *explained. Guardianſhip by that Statute not Transferable over. Of the Power of a Guardian: He cannot Preſent to a Benefice, and why. He ſhall have a*

Quare Impedit *in his own Name. He may hold Courts, and grant Copies. May make Leaſes for years, and yet they are determined by his Death. May Enter for Condition broken and how. Guardian by Nurture. Remedy againſt the Guardian on Account. Allowance on Account. How he is to be Charged after Fourteen years of Age. Waſte.*

BEfore I come to treat of Actions and Suits, brought by or againſt Infants, it will be proper to ſhew the Nature and Office of a *Guardian* and *Prochein amy*; becauſe by them he muſt Sue and Defend, Appear and Proſecute.

Four ways by which any man may Sue.

Now there are but Four ways by which any man may Sue.

1. *In propria perſona.*
2. *Per Attornatum.*
3. *Per Guardianum.*
4. *Per Prochein amy*, or *Proximum amicum.*

An Infant cannot Sue *in propria perſona*, ſo that he is not ſuppoſed of ability to manage his Cauſes to the beſt advantage: Neither can he Sue by Attorney; for he cannot make an Attorney.

But I ſhall only treat of a *Guardian in Socage*, or by Nurture and Nature, the other Guardians being now uſeleſs, their Power and Court being taken away by Act of Parliament. And I ſhall not only treat of Guardians, in reſpect of Suits; but alſo of his Office and Power, in reſpect of his other Management of the Infants perſon, Eſtate and Education.

In our Books we find a *Guardian* and a *Prochein amy* have been promiſcuouſly uſed the one for the other; but in truth they are ſeveral and ought to be diſtinguiſhed, or elſe the Judgments may be erroneous: And as to that, the difference lies here; Infant may be admitted to Sue by *Guardian* or *Prochein amy*, where he is to demand or gain any thing; but when he is to defend a Suit in an Action Real or Perſonal, he ought to be admitted by his Guardian, and the Guardian ought to be admitted by the Court. And the Reaſon why an Infant ſhall, in any Action brought againſt him, appear and defend by his Guardian, and not by his Attorney, is, (as I ſaid) becauſe he is not preſumed to have Conuſance of his own Matters, or to have intelligence to chuſe a fit man to plead for him; and therefore the Court chooſeth one for him againſt whom Infant ſhall have his Action, if he miſ-plead or miſ-behave himſelf. And if one has occaſion to Sue an Infant, he muſt move the Court, that a Guardian may be aſſigned for him, if one be not agreed upon by Conſent, *Cro. Jac.* 640. *Simpſon* and *Jackſon*.

The true difference between a *Guardian* and a *Prochein amy*.

Court moved to aſſign a Guardian.

The Defendant ought always to appear by *Guardian*, and not by *Prochein amy*; and the admittance of the Infant Defendant by *Prochein amy*, hath been adjudged to be erroneous.

Infant Def. to appear by *Guardian*, and not by *Prochein amy*.

Now the firſt News we hear of a *Prochein amy*, is in the Statute of *Weſt.* 2. *c.* 15. and he is appointed in theſe Caſes:

*Prochein amy*, in what cases appointed.

1. Where an Infant is to Sue his Guardian, as for Waſte,&c.

2. VVhen the Guardian will not Sue for him.

3. VVhen the Infant is Eloigned; and the Reaſon of that is, when he is admitted by Guardian, he ought to appear in perſon to the View of the Court, which he cannot do when he is eloigned; and therefore the *Prochein amy*, who is Guardian in Socage, or by Nurture, (*viz.* the next of Blood, to whom the Land may not diſcend) may pray to be received as his *Prochein amy*. The Plaintiff in a Writ of *Right* did appear by *Prochein amy*, and afterwards he came to his full Age, and did proſecute his Suit, and did recover by *Prochein amy*, being of full Age; this is not aſſignable for Error to Reverſe Judgment, and he might have his Plea to it, and a Verdict paſt, and ſo 'tis aided, 1 *Bulſtr.* 24. *Stone* and *March*.

And in *Simpſon* and *Jackſon*'s Caſe, an Infant Defendant was admitted by *Prochein amy* in an Action of *Ejectment*, and it was adjudged Error. So when one is admitted by *Prochein amy* when he is at full Age, it is Error.

But the Caſe of *Simpſon* and *Jackſon* is now fully Reported in *Palmer*'s Reports, which becauſe it was a leading and ſetling Caſe, as to this part, I ſhall more largely recite: *Palm.* 296.

It

It was in that Caſe Reſolved, when an Infant is Plaintiff he may Sue by Guardian or *Prochein amy*; but when he is Defendant, in all Caſes he muſt appear by his Guardian; and the reaſon of the diverſity is, when the Infant is Plaintiff, and when Defendant, that in one Caſe he may Sue by *Prochein amy* or *Guardian*, and in the other by *Guardian* only, is this; becauſe when he is Sued, and the *Prochein amy* by his voluntary Love appears for him, there, altho' he loſeth by default of the *Prochein amy*, this is not a final Concluſion to him, but he may reſort to a more high Action. And the Law does not give him any *Action on the Caſe* againſt his *Prochein amy*; but when the Court appoints a Guardian where the Infant is Defendant, there this Action ſhall conclude the Infant: And ſo in all Caſes, when he Sues as Plaintiff by Guardian, except in the Three Caſes above mentioned.

The true Reaſon of the difference.

No Action on the Caſe againſt *Prochein amy*.

The Infant ought to be Viewed by the Court before he be admitted; and therefore it was Agreed in *Siderfin*, *p.* 69. That an Infant, Plaintiff in *Error* to reverſe an Attainder, may be admitted by a Guardian, or by *Prochein amy*: But the Infant there not being in Court (only his Mother was there) the Court would not intermeddle, *Siderfin*, *p.*69.

The Infant to be viewed in Court before admitted.

And in 2 *Leon. p.* 189. the Court refuſed to appoint a Guardian for an Infant Retorned Tenant in Dower, unleſs he be in the Court in perſon.

No ſpecial admittance need to be for the Defendant.

One cannot anſwer for an Infant as Guardian in *Chancery*, or any other Court, except he be aſſigned Guardian by the Court. The Rule was, That the Defendant ſhould appear and plead by Guardian, and Verdict *pro Quer'* It was moved in Arreſt of Judgment, becauſe its ſaid, he appeared *per Guardian' admiſſur*, and ſaith not *ſpecialiter admiſſum*, and in fact there was never any actual Admiſſion. *Per Cur.* A Guardian need not be admitted for the Defendant, be he Infant or Ideot, but for the Plaintiff he muſt, and if he be Guardian by the Kings Letters Patents, he need not be admitted by the Court, *Stiles Rep.* 369. 2 *Keb.* 302. *Cumber and Walter.*

Who to be admitted Guardian.

But Note, If one pray to be admitted to Sue Actions by Guardian, and he had a Guardian appointed by his Father, or *Ex proviſione Legis*, (*viz.*) Guardian in Socage, who acts as Guardian to ſuch Perſon, no other ſhall be admitted to Sue for him, unleſs that ſuch a perſon miſdemean himſelf. *Per Keeling* Chief Juſtice, *Siderfin p.* 424.

Where the Infants appearance by Attorney is Error or not.

Where it is ſaid in our Books, that if Infant appear by Attorney it is Error; it is to be underſtood with this difference, where the Tenant or Defendant may not by Law appear by Attorney, and where the Tenant or Defendant may appear by Attorney, but upon ſome *Proceſs* by Reaſon of ſome Default or Contempt, he ought to appear in perſon; in the firſt caſe, if the Court admit him by Attorney it is Error, as if

Infant

Infant appears by Attorney, but in the other caſe it ſhall not be Error, for the Court may diſpenſe with the Contempt, and admit him by Attorney, and this is no prejudice to the Plaintiff, 8 *Rep.* 58. *Beecher's* Caſe.

How the Infants appearance by Attorney ſhall be tried.

Now the Infants appearance by Attorney is Error, but ſhall be tried *per pais*, and not by the Juſtices; for the making the Warrant of Attorney to appear, is an Act of the Party without Examination of the Judges, 9 *Rep.* 30. *Abbot of Strata Marcella's* Caſe.

In Treſpaſs againſt three, after Judgment it was aſſigned for Error, That one of the Defendants was an Infant at the time of the Plea pleaded *per* Attorney. *Per Cur'* It is Error, as *Cr. Jac.* 303. *Marlborough's* Caſe; but being after a Verdict it had not been Error, if one of the Plaintiffs for whom it was, had been an Infant, that being ſaved by 21 *Jac. c.* Judgment was totally reverſed, 1 *Keb.* 940. *Topham's* Caſe.

Infant Executor muſt appear by Guardian, and why.

If an Action of Debt is brought againſt an Infant Executor, he may not appear by Attorney, but ought to appear by Guardian, otherwiſe it is Error; for elſe it might be great prejudice, for Aſſets may be found in his Hands, and ſo Judgment ſhall be given to recover the Debt, Damages and Coſts againſt him, *de bonis Teſtatoris ſi, &c. & ſi non*, the Damages and Coſts *de bonis propriis*, and peradventure the Infant had a Releaſe or Acquittance to plead, and ſo he ſhall be charged *de bonis propriis* by

Action lies against a Guardian for miſpleading.

by ill pleading without remedy againſt the Attorney; but if a Guardian miſplead ſo, an Action lies againſt him, if he have any loſs, and his being Executor does not make him as a Man of full Age; and ſo is *Cr. Jac.* 441. for if he ſhould plead by Attorney, he may by a falſe Plea be charged *de bonis propriis*; and altho he pleads truly, he ſhall be charged in Damages *de bonis propriis*, *Mich.* 15. *Jac. B. R. Weſtcot and Colling*, *Cr. Jac.* 420, 441. the ſame Caſe.

*Note*, An Attorney may plead *non ſum informatus*, but a Guardian cannot.

If a Clerk of *Chancery* declare there by Bill, by force of his Priviledge, he being within Age, and not *per* Guardian; This is Erroneous. And its more dangerous for an Infant to appear in perſon than by Attorney, for if Attorney defrauds him he hath remedy, but not if he appear in perſon, 1 *Rolls Abr.* 766.

Attorney may plead *non ſum informatus*, but a Guardian cannot But Infant Executor may Sue by Attorney and why. But he muſt defend by Guardian.

But now an Infant Executor may Sue by Attorney, tho' he muſt defend by Guardian, for an Infant Executor Plaintiff cannot by it draw any loſs to himſelf, and he repreſents the perſon of the Teſtator; and it was adjudged in *Foxwiſt*'s Caſe, (tho' in that caſe *Twiſden fuit contra fortiter*) that an Infant Executor under 17 years of Age may not Sue *per* Attorney, becauſe he cannot make an Attorney. And in *Mod. Rep.* the ſame caſe, it was held Error for the Infant to appear otherwiſe than by Guardian, and this Error was not holpen by the Statute of *Jeofayls*. *Mod. Rep.* 298.

And

And in 1 *Rolls Rep.* 288. Its ſaid, an Infant Adminiſtrator may bring an Action of Debt and make an Attorney, and this ſhall not be Error, if Judgment paſs againſt him, for he is at no prejudice by it; but only is barred of the Debt of the Teſtator. And it was adjudged in the time of *Q. Eliz.* That if an Infant and a Man of full Age are made Executors, they may bring an Action as Executor, and the Infant may Sue by Attorney without making any *prochein Amy*; becauſe he Sues in the Right of the Teſtator, and not in his own Right, *Trin.* 38. *Eliz. B. R.*

Error to be aſſigned by Guardian, and not by Attorney.

If Judgment be given againſt an Infant, and the Infant being within Age, brings a Writ of Error to Reverſe the Judgment, he ought to aſſign the Error by Guardian and not by Attorney, *Nov. Ent.* 289.

Baron and Feme (the Feme being within Age) are vouched, the Feme ought to appear by Guardian.

If a Common Recovery be ſuffered, and the Baron and Feme (as in the right of the Wife, the Wife being within Age) are vouched, and they appear by Attorney and Vouch-over, and ſo a Common Recovery is had; this is Error, for tho' the Husband be of full Age, yet the Wife being within Age ought to appear by Guardian, 1 *Rolls Abr.* 288. *Holland and Lee.*

Baron and Feme, Feme an Infant admitted by Guardian.

Error was brought of a Judgment in *Aſſumpſit* againſt Baron and Feme, and the Error aſſigned was, That the Feme was an Infant and appeared by Attorney, whereas the Court ought to have admitted her by Guardian. But if the Wife be of Age, then the Husband may make an Attorney for her and himſelf, and the Entry is *per Attornat'*

of

of the Baron and Feme, and not of the Husband only, and for this cauſe the Judgment was reverſed. And *Hale* ſaid, the Husband could not diſſavow the Guardian made by the Court for his Wife, 1 *Vent.* 185. *Freeman and Boddington.*

Baron cannot diſavow the Guardian.

Error was brought to Reverſe a Judgment in *B. R.* againſt the Heir. Error aſſigned was, becauſe the Infant appeared by *J. S.* his Guardian generally, and had not entred any Admiſſion upon the Roll, as he ought. *Vide Rawlin's* Caſe, 4 *Rep.* the want of which in *B. R.* is Error. And it ſeems there is difference between *B. C.* and *B. R.* upon comparing 4 *Rep.* 5. 3. *b.* with *Yelv.* 58. *Sid.* 173. *Swift and Nott.*

But *Note*, Stat. of 21 *Jac. c.* 13. aids the appearance by Attorney, where it ought to be by Guardian after Verdict.

Having ſhewn how the Law ſtands to *Guardian* and *Prochein Amy*, as to Infants Suing and being Sued, I ſhall ſpeak ſomething of the manner of admitting *per Gardianum*, and the Form of the Entry, in which there is ſome Nicety.

The Form of the Entry of a Guardian to Proſecute.

The Form of the Entry of a Guardian to Proſecute is this, The Infant muſt be admitted before a Judge of that Court wherein he intends to Proſecute; and the Form is, *Conceſſum eſt per Cur' hic, qd' (petens) ſequatur per* J. S. *Gardianum ſuum in placito, &c.* Now in *Young* and *Young's* Caſe, It was entred on the Plea Roll, *quod conceſſum eſt per Curiam*, that the Plaintiff by ſuch a one his Guardian

Guardian ſhould Proſecute, *&c.* and ſo it was entred in the Remembrance; and the Philazers Roll is *Quod J. V.* by *J. S.* his Guardian, *ad hoc admiſſus per Cur' obtulit ſe 4 die, &c.* but there was no Entry in the Philazers Roll, as is uſual in ſuch Caſes; *Quod conceſſum eſt per Cur' qd' petens ſequatur,* by *J. S.* his Guardian. But by the Court it may be amended, tho' after a Writ of Error brought and the Record removed; becauſe it appears by the ſeveral Entries, that he ſued by his Guardian, and it is only the omiſſion of the Clerk, *Cr. Car.* 86. *Young* and *Young.*

The Court favours the Entries.

Another Entry was alſo favoured by the Court in *Hesketh and Lees* Caſe, *p.* 22 *Car.* 2. the Entry of the Admiſſion in *Lancaſter* was in this manner, *Conceſſum eſt per Curiam hic quod Johannes M. ſequatur pro Tho' Hesketh Arm' qui infra ætatem exiſtit, ut Gardianus prædict' Thom' verſus Thom' Lee Arm', & Alexandrum Rigby Arm' in placito terræ,* and in the Body of the Common Recovery, immediately after the end of the Count, the Entry is in this manner. *ſſ. Et præd' Thomas Hesketh qui infra ætatem exiſtit per Johannem M. Arm' qui admiſſus eſt per Curiam hic ad ſequendum pro eod' Thom' ut Gardianus ipſius Thom' in placito præd' in propria perſona ſua venit & def. jus ſuum quando,* and two exceptions were taken to it.

1*ſt.* That the Guardian ought to have been entred *ad defendend'* for the Infant, and not *ad ſequend',* becauſe the Infant was Tenant. But *per Cur'* it is good enough, for the word

*ad*

*Ad ſequendum*, how to be expounded.

*ad ſequend'* is as ſignificant as the word *defendend'*, and the word *ſequend'* may be indifferently applied to the Plaintiff or Defendant; for the Suit of the one or the other ought to be followed; (and tho' this be true *lato ſenſu*, yet the Forms of Entries in ſuch ſolemn things as Recoveries, ought to be cloſely kept.) *Ideo quære.*

2*ly*, Its ſaid, the Infant *venit in propria perſona. Sed non allocatur:* Its plain by the Record that the Infant appeareth *per Gardianum ſuum*, and then the words *in propria perſona ſua* are idle and ſuperfluous. Or it may be thus explained (to ſupport it) that the Infant comes *per Gardianum*, which Guardian *venit in propria perſona.*

No Special Record of the Admittance.

In *Rawlins*'s Caſe, 4 *Rep.* 54. the Plaintiff being Infant, was admitted *per Gardian'*, and no *Special* Record made of this admittance, as is uſual in *B. C.* but upon view of the Preſidents it was held good, and no Error; if it cannot appear to the Court that there was a Guardian admitted, the Form of the Entry ſhall not be ſo ſeverely examined as in *Rawlins*'s Caſe. As for *Cro. Jac.* 641. there was another Reaſon for Reverſing the Judgment.

Now I come to Treat of the Nature, and Power, and Office of a Guardian; and what acts of his ſhall be binding to an Infant, or not.

Three manner of Guardianſhips.

There are Three manner of Guardianſhips; (*viz.*) By Common Law, by Statute Law, and by Cuſtom.

By

By the Common Law there are Four manner of Guardians:

1. Guardian by Chivalry.
2. Guardian by Nature, as the Father of his eldeſt Son.
3. Guardian in Socage. And,
4. Guardian by Cauſe of Nurture.

1. Guardian by the Statute, are by *Weſt. 2. c.* and by the Statute of 4 *&* 5 *P. & M. Of Women Children*; and that is in two manners, either of the Father or Mother without aſſignation, or of any other to whom the Father ſhall appoint the Cuſtody, either by his laſt Will, or by any act in his Life time; and by the Statute of 12 *Car. 2. c. 24. Vide infrà de hoc Statuto.*

*Who ſhall be Guardian in Socage.*

Now Guardian in Socage is he who is the next of Blood, to whom the Inheritance cannot diſcend, and ſo Affinity without Blood is excluded. He hath the Profits to the uſe of the Heir, till the Heir accompliſh the age of 14 years, and muſt yield therefore an Account to the Heir.

Guardian at Common Law. Guardian in Socage, who: The Nature of him.

The Guardian hath nothing to his own uſe, but to the uſe of the Heir; and therefore he ſhall not forfeit his Intereſt by Outlawry, or by attainder of Felony or Treaſon.

In

In *Sadler* and *Draper*'s Case, the Point was: Whether the Brother of the Half-blood of the Mother of an Infant, shall be Guardian in Socage of Land *per* descent on part of the Father, *Cro.El.*825. *Swan*'s Case, *Jones p.* 17. *Sadler* and *Draper*.

But this being in Ejectment, and it not being found by the Verdict, that the Lessor of the Plaintiff, who claims to be Guardian in Socage *fuit proximus de Sanguine a quel, &c.* the Court shall not intend it, and so no Title found *pro Quer*; but as to the Point in Law, no Resolution.

In *Moor* 635. the Brother of the Half-blood shall be Guardian in Socage before the Uncle of the part of the Mother; yet the Book makes a *Quære*, if the Brother himself be within Fourteen. But that is no *Quære* now; for it is Resolved, that one under Fourteen years shall not be Guardian, *Mo.* 635.

If three Uncles are in equal Degree, the eldest shall be Guardian in Socage, 1 *Inst.* 88.

Guardian of Copyhold.

If a Copyhold descend to an Infant within the age of Fourteen years, the *Procbein amy*, to whom the Land may not descend, shall have the Custody of this, as well as of his Freehold; unless the Custom appoint it to some other, *Hill.* 44 *El.* B. R. *Eggleton*'s Case.

If a man seised of a Rent-charge, Rent-seck, Common of Pasture, &c. and such like, Inheritance that lies not in Tenure, and dies, his Heir within the age of Fourteen, he may choose

choose his Guardian, unleſs he be of very tender years, 1 *Inſt.* 87. *b.*

If there be three Brethren, and the youngeſt holdeth Lands in Socage, and hath Iſſue and dieth, his Iſſue within the Age of 14 years; both the Uncles are in *æquali gradu*, yet the Law preferreth the eldeſt, and he ſhall be Guardian. If a Man be ſeiſed of Lands holden in Socage of the part of his Father, and of other Lands held in Socage of the part of his Mother and dieth, his Iſſue being within the Age of 14 years; in this caſe, ſuch of the next of Kin of either ſide as firſt happeth the Body of the Heir, ſhall have him, but the next of the Blood of the part of the Father ſhall enter into the Land on the part of the Mother, and the next of Kin of the part of the Mother, ſhall enter into the Lands of the part of the Father: Now all poſſibility of Diſcent is excluded as to being ſuch Guardian; therefore, if a Man hath Iſſue two Sons by ſeveral *Venters*, and having Lands held in Socage of the nature of Burrough *Engliſh*, and dies, the younger Brother within the Age of 14 years, the elder Brother of the half Blood ſhall not have the cuſtody of the Lands, becauſe by poſſibility the elder may Inherit the Land, for if the youngeſt dies, *ſans* Iſſue, and the Land diſcend to an Uncle, the elder Brother of the half Blood may be Heir to him.

All poſſibility of Diſcent excluded.

In *Rolls Abr.* 2 *part*, *p.* 40. Its ſaid, the Brother of the half Blood ſhall be Guardian in Socage.

Gardian by Nature and in Socage the difference.

There is a difference between Guardian in Socage and Guardian by Nature, tho' one and the ſame perſon is both, as the Father in caſe of a Tenure in Socage ſhall be by Law accounted as Guardian in Socage, and not as a Guardian in Nature; becauſe in the caſe of a Tenure in Socage, the Father muſt be accountable to the Son for the profits of his Lands, which he ſhould not be if he had the Cuſtody as Father, and by Nature, and the Act of the Law does no Man wrong, 1 *Inſt.* 88. *b.*

Infant cannot be Guardian in Socage.

Infant within Age, that is in the Cuſtody of another, cannot be Guardian in Socage, becauſe no Writ of account lies againſt an Infant.

Guardianſhip not to ſurvive to the Huſband.

If the Mother be Guardian in Socage, and takes Husband and dies, the Husband ſhall not have this Cuſtody by Survivor, becauſe the Wife had it *en auter droit*, and in right of the Heir.

Stat. 12 *Car.* 2. *c.* 24.

But the ancient Law in the caſe of Guardians, is in a great meaſure altred by the Statute of 12 *Car.* 2. *c.* 24. if the Statute be perſued. It enacts, That where any perſon hath, or ſhall have any Child or Children under the Age of 21 years, and not Married at the time of his death, it ſhall be lawful for the Father of ſuch Child or Children, whether born at the time of the deceaſe of the Father, or at that time *in ventre ſa mere*, or whether ſuch Children be within the Age of 21 years, or of full Age, by Deed executed in his Life time, or by his laſt Will and Teſtament in Writing, in the preſence of

of two or more credible Witneſſes, to diſpoſe of the Cuſtody and Tuition of ſuch Child or Children, for and during the time he or they ſhall remain under Age, or any leſſer time to any perſon or perſons, in poſſeſſion or remainder, other than Popiſh Recuſants; and ſuch diſpoſition ſhall be good againſt all perſons claiming ſuch Child as Guardian in Socage or otherwiſe. Tho' all Tenures are now Socage, and the next of Kin to whom the Land cannot diſcend is Guardian until the Heirs Age of 14. Yet the Father by this Act may nominate the Guardian to his Heir, and for any time until the Heirs age of One and twenty years, and ſuch Guardian ſhall have the like remedy for the Ward as Guardian at Common Law. The Land follows the Guardian-ſhip; ſuch a ſpecial Guardian cannot transfer the Cuſtody of the Ward by Deed or Will, or any other way: The Truſt is only perſonal and not aſſignable, and if ſuch Guardian to whom ſuch Cuſtody is appointed dies, before the Heirs Age of 21 years, it dies with him, *Vaugham* 181, 182. Explained.

A Prohibition was prayed to the *Prerogative Court* of *Canterbury*, Sir *Henry Wood* having deviſed the Guardianſhip of his Daughter by his Will in Writing according to this Act, to the Lady *Cheſter* his Siſter; the Ducheſs of *Cleveland*, to whoſe Son this Daughter, being about 8 years old, was contracted, pretending that Sir *Henry Wood* by word revoked this diſpoſition of Guardianſhip ſued in the *Prerogative Court*, to have this nuncupative

Will proved; and the Court granted a Prohibition, for they are not to prove a Will concerning the Guardianſhip of a Child, which is a thing Conuſable here, and to be judged whether it be deviſed perſuant to the Statute, 1 *Vent. Rep.* 207. *Lady Cheſter's* Caſe.

This Act extends to *Ireland*. The Guardian by this Act may have raviſhment of Ward.

In the Lord *Angleſey* and the Lord *Oſſery's* Caſe, 27 *Car.* 2. *B. R. Hale* Chief Juſtice, and the Court agreed, That this Statute extends to *Ireland*, and that the Guardian appointed by the Will may have raviſhment of Ward, as the Guardian by Knights ſervice, or Guardian in Socage at Common Law.

And a Guard diſpoſed by Will in Writing, is not repealable by *Parol Codicil* in the Spiritual Court.

## *Of the Power of a Guardian.*

Not to preſent to a benefice and why.

Guardian in Socage ſhall not preſent to a Benefice in the right of the Heir, becauſe he cannot be accountable for it, and he can make no benefit thereof, for that the Law hates Simoniacal Contracts, but the Heir ſhall preſent himſelf, 1 *Inſt.* 88, 89.

What Acts the Heir may do contrary to the Will of his Guardian.

In ſome Acts the Heir ſhall do contrary to the Will of his Guardian. As in Appeal by Infant of the death of his Father; if the Plaintiff hath Guardians aſſigned him; and after the Infant, by the mediation of Friends compoundeth with the Defendant for 1500*l.* and thereupon the Infant comes into Court, and ſaith he will relinquiſh the Suit againſt the Defendant; and yet notwithſtanding, the

the Guardian will proſecute the Suit; the Court in diſcretion may diſcharge the Guardian, and ſo the Suit will be diſcontinued, for his demand by this Suit is but revenge, and it may be chargable to him, and perhaps he will leave the revenge to God, 1 *Rolls Abr.* 288. *b. Slaning and Fitz.*

Guardian in Socage of a Mannor, to which an Advowſon is appendant, if he be diſturbed he ſhall have a *Quare Impedit* in his own name, altho' he cannot account for it, 1 *Ed.* 132. Guardian in Socage ſhall have a *Quare Impedit.*

But Guardian in Socage may hold Courts in his own name, and may grant Copies, for he is *dominus pro tempore*, and hath intereſt in the Lands *ex proviſione Legis*; but yet ſo as to be accountable for Fines. And ſo he may grant a Copyhold in Reverſion according to the Cuſtom of the Mannor, and this ſhall be good, altho' it doth not come in Poſſeſſion during the Minority of the Heir, *Owen p.* 115. *Shopland and Ryder*, 1 *Rolls Abr.* 41. *Meſta's* Caſe. May hold Courts and grant Copies.

If the Ward in Socage had a Rent-charge or ſeck, or ſuch things which are not held of any perſon; yet the Guardian in Socage ſhall take into his Cuſtody as well theſe as Lands held in Socage, 1 *Inſt.* 88.

Guardian in Socage may make a Leaſe for years of the Land of the Ward, and the Leſſee ſhall have *Ejectione firmæ*, 2 *Rolls Abr.* 41.

If Guardian by Nurture make a Leaſe by Indenture to one, being under the Title of the Infant, rendring Rent to himſelf, which is paid accordingly; yet this is not any Diſſeiſin to the Infant, *Paſc.* 3 *Jac. B. R. per Tanfield.*

It was a Queſtion, if *A.* ſeiſed in Fee of Lands in Socage, and let the ſame to *J. S.* for years, and died, his Heir within the Age of 14 years; the Wife of *A.* being Guardian in Socage, let the ſame to *J. S.* for years; whether this Leaſe was ſurrendred or determined. *Per Cur.* It is determined by operation of Law, for ſurrendred it cannot be, for the Guardian hath not any Reverſion capable of a Surrender, but only Authority in Law to take the profits to the uſe of the Heir. Guardian in Socage has ſuch eſtate in the Reverſion, that he may enter for Condition broken, yet that is in Right of the Heir, 1 *Leon. p.* 322. *Wilers and Whitewood.*

Surrender determined.

If Leſſee for years take another Leaſe from Guardian in Socage, the ſame is a Surrender of the firſt Leaſe. *Note*, The ſecond Leaſe was made in the name of the Guardian, 4 *Leon p.* 7.

Tenant in Socage makes a Leaſe for 4 years, and dies, his Heir within the Age of 8 years, the Mother being Guardian in Socage leaſeth by Indenture to the ſame Leſſee for 14 years, the firſt Leaſe is ſurrendred. *Aliter* of a Leaſe made by Guardian *per nurture*, 4 *Leon.p.*161.

But its reported differently in 4 *Leon.*

It

If Guardian by Nature make a Leaſe by Indenture to a Stranger being in, under the Title of the Infant, rendring Rent to himſelf, which is paid accordingly, yet this is not any Diſſeiſin to the Infant, *Paſch.* 3. *Jac. B.R. per Tanfeild.* Guardian by Nature.

A Leaſe made by a Guardian in Socage ends by his Death, 1 *Brownl.* 79. Leaſe by Guardian ends by his death.

The *Prochein amy* may make Partition with the other *parcener*, and this ſhall bind the Infant if it be equal, 9 *H.*6.5.

The admiſſion of Heirs to Copyhold, *per Prochein Amy*, 1 *Siderfin* 37. is not good. For he muſt do Corporal ſervice. *Quære*, For ſome ſay it is good, the Heir conſenting, 4 *Rep.*

The Guardian recovers in Debt on Bond made to an Infant, and the Defendant paid the principal, and prays that the Guardian be ordred to acknowledge ſatisfaction. *Per Cur.* The Guardian may not acknowledge ſatisfaction for more than he receives, and for ſo much they ordred him to acknowledge, and that no Execution ſhould Iſſue out for the Reſidue, *Moo.*852. *White and Hull.*

If the Guardian takes Bond in his own name for Arears of Rent due from the Infants Tenants, by this the Guardian hath made it his own Debt, 26 *Car.* 2. *Beale and Buckley in Chancery.*

*Remedy againſt the Guardian by Infant.*

Account. The Heir after the Age of 14 years, ſhall have an Action of Account againſt the Guardian in Socage, when he will at his pleaſure, but no *Capias* lies againſt the Guardian in Socage, neither doth the Statute of *W.* 2. *c.* 11. of Impriſonment for account to Guardians in Socage, neither are they within the word *Servientes*, 1 *Inſt.* 89.

No *Capias* againſt him.

Allowance for reaſonable coſts and expence.

But Guardian in Socage on Account ſhall have allowance of all his reaſonable Coſts and Expences.

Guardian in Socage how to be charged after 14. years.

He ſhall be charged as Bayliff after the Age of 14 years. If Guardian recovers the Rents and Profits of the Infants Lands, and be Robbed of the ſame, if he be Robbed without his own default or negligence, he ſhall diſcharged thereof.

*Waſt.*

In what Caſes to be diſcharged of the Rents and Profits

Some Books ſay, Action lies againſt the Guardian by the Infant, for not praying his Age.

No Action of *Waſt* lies againſt a Guardian, but an Account or Treſpaſs doth, not againſt Tenant by Stat. *Staple Elegit*, &c. 1 *Inſt.* 54.

CHAP.

## CHAP. V.

### *Of Actions by Infants.*

*Account by Infant againſt his Guardian, when and how. He may have a* Dum ſuit infra ætatem, *and in what caſes. Surrender of a Copyhold makes no Diſcontinuance. Aſſize* port *by Infant; where the Aſſize ſhall be taken at large, or not. When he ſhall bring a* Quare Impedit *upon an* Uſurpation. W. 2. c. 15. *explained. Of his Action in reference to Reciprocal Contracts.* Audita Querela, *in what Caſes, and when to be brought by him.* Error *brought by him. How far the Statute of* 21 Jac. Of Limitations, *extends to Infants bringing Actions, or not. Preſidents. Admiſſion to Sue* per Guardian. *Appeal by Infant. Infant replies his Infancy to a Plea of* Non aſſumpſit infra ſex annos. *His admiſſion to Sue by* Prochein amy.

HAving ſhewed how an Infant muſt Sue and be Sued, as Plaintiff or Demandant, Tenant or Defendant; and having diſcours'd of the Nature, Power and Office of a Guardian, I ſhall proceed to the Actions themſelves, and ſhew, where and in what Caſes what ſpecial Actions may be brought by Infants; and what Actions, and for what Cauſes, may be brought againſt them.

And

And first of Actions that may be brought by Infants.

Account against the Guardian, and how brought.

You may in the Close of the precedent Chapter observe, how that an Heir, after Fourteen years of Age, may have an Action of *Account* against his Guardian; and as to that observe further, That it was Resolved in *Cro. Jac.* 219. in Case *Anonymous*, that an Infant was admitted by his Guardian (or rather *Prochein amy*) to sue *Account* against his Guardian in Socage, for the Profits received after the Infant had accomplish'd his age of Fourteen years; and the Action was brought against him as against his Bayliff, and so it ought to be, *Cro. Jac.* 219.

Executors of the Heir shall have Account against the Guardian, and when.

And where the Heir in Socage dies before the Age of Fourteen, his Executors or Administrators shall have an Action of *Account* presently, and yet the Heir himself should not have an Action before Fourteen; but the Reason is, because the Statute of *W.* 2. *c.* 23. saith, *Eandem Actionem habeant Executores*, and not *ad idem tempus*, 2 Inst. 204.

In *Hughe*'s Case, *Godb.* 214. it was agreed *per Cur.* That if an Infant brings an Action against his Guardian for Money, and recovereth, and he bringeth the Money into Court and there deposeth it; that the same is a good Discharge against the Infant, and he shall not answer the Suit again in Account.

*Dum fuit infra ætatem.*

Infant may have an Action in nature of a *Dum fuit infra ætatem* upon a Surrender of Copyhold Land, 1 *Leon.* 95. and he may enter: For the surrender of a Copyhold Estate doth

oth not make a Diſcontinuance. The Caſe
as, *M.* had Iſſue two Sons, *Richard* and *Tho-*
*as*, and ſurrendred Copyhold Lands to the
ſe of *Richard* for Life, and after to the uſe
f *Thomas* in Fee, they both (*Thomas* being
within age) ſurrender to the uſe of *Robert* in
ee, who is admitted; *Richard* dies, *Thomas*
ies, having Iſſue *A.* who is alſo admitted
nd enters into the Land; and it was ad-
dged his Entry was Congeable, and he
eed not be put to his Plaint in nature of a
*Dum fuit infra ætatem*, 1 Leon. p. 225. *Knight*
nd *Foreman.*

Surrender of a Copyhold makes no Diſcontinuance.

Two Joyntenants make a Feoffment, they
all have ſeveral Writs of *Dum fuit infra*
*tatem*, as upon ſeveral Feoffments, 19 *H.* 6.
3.

But note, in a *Dum fuit infra ætaetm*, the Plaintiff need not ſhew the time when the Alienation was made.

In the Caſe of Infants bringing an Aſſize, s commonly Reported in our Books, That he Aſſize ſhall be taken at large; that is, ithout any reſpect to the Bar. As where n Infant brings an Aſſize at Fifteen years of ge of Gavelkind Land, where the Cuſtom as that he might alien at that age as well s a man at Full age, and the Tenant pleads n Bar; the Aſſize ſhall be taken at large; it all be enquired of the Bar; and if that be ound againſt the Infant, it ſhall be enquired whether he had other Title, altho' he was f Full age to alien, 32 *Aſſ.* 4.

Aſſize, in caſe of Infants where the Aſſize ſhall be taken at large.

But

But where an Infant is put to anſwer Plea in Bar, there, it ſhall never be enquired large, or of the Circumſtances of the Ba 22 *H.*6.51.*b.*

As in Aſſize brought by an Infant, if t Defendant pleads a Releaſe of the Anceſt of the Plaintiff by Fine with Warranty, t Aſſize ſhall not be taken to enquire of t Circumſtances; for that this is a Matter Record, to which the Infant of neceſſ ought to anſwer. *Id.ibid.*

And its ſaid in 12 *H.*4. 22. If the Wa ranty of the Anceſtor be pleaded in B againſt an Infant, becauſe the Infant cann anſwer to the Deed without enquiry of t Bar; if the Bar be found, it ſhall be e quired of all things which may avoid or d ſtroy the Warranty, if he had other Titl But if Infant bring an Aſſize, and upon N *tort nul diſſeiſin* pleaded it be found again the Plaintiff, this by Intendment ſhall be enquiry of the Circumſtances; for upon t Iſſue they may enquire of any Right, 12 22.*b*,

In an Aſſize brought by Infant in B if the Tenant pleads a Matter of Reco in bar, (*viz.*) a Recovery by him againſt t Plaintiff in another *Aſſize* brought by him B. C. To which the Plaintiff replies, he yet *deins age*, and that his Writ was purch ſed and bore date before the Writ brought B. C. upon which the Tenant demurs. Th was adjudged a good Replication, and t Aſſize ſhall be taken only in the right of D mages; for by the Demurrer, the *Ouſter*

the Plaintiff is acknowledged, and the *Diſſeiſin*, *Cro. Jac.* 468. *Holford* and *Platt*.

But enough of this Ancient Learning in this Point, in favour of an *Aſſize* brought by Infant, the then moſt uſual Action to recover Poſſeſſions.

As to *Quare Impedits* upon the Statute of *W.* 2. *c.* 5. it is to be known, that that Statute extends to none but thoſe who are Heirs, or in degree of Heirs, and are in by diſcent: For at Common Law Infant-Heirs were by an Uſurpation driven to a Writ of *Right*; and no purchaſor, tho' an Infant, is relieved by that Statute, *Hob. p.* 238. *Lord Stanhope's* Caſe. *Quare Impedit. Stat. W.* 2. *c.* 15. explained.

Now if an Infant-Heir ſuffers an Uſurpation, and another Avoidance falls during his Nonage, he may have a *Quare Impedit* preſently, tho' the Statute ſaith, *poſt quam ad ætatem pervenerit.* And if a Guardian in Socage, or his Ward, after Fourteen years of age, ſuffer an Uſurpation, he ſhall have a *Quare Impedit* at any other Turn before One and twenty: But if the Infant comes to Age within ſix Months after the Uſurpation, and remove not the Incumbent by Suit, he is out of the Statute.

But it would be in vain to enumerate particular Perſonal Actions; for an Infant may have as much a remedy for any Debt or Duty, as a Man of Full age, if he purſue his Remedy as he ought. Yet I ſhall mention a particular Reſolution as to Conſiderations, (which will be more at large handled when I ſpeak of *Contracts*.)

In

Consideration reciprocal.

In Consideration of such an act to be done by an Infant, the Defendant assumes to pay him so much Money; the Infant may maintain no Action for the Money before the act done. And yet (in other persons, the precedent act is to be done first) as the Consideration is upon the Infants paying a Sum of Money; and it was urged that this is void and so wants a Consideration. And *per Cur.* tho' the Money is not paid, yet the Action well lies; for it is only in the election of Infant to make his own Promise void, and not in the election of the other party, *Sid.* p. 38,41. *Foreſt's* Case.

But more of this *vide poſteà ſub titulo, Of Contracts.*

## *Of* Audita Querela *brought by Infant.*

*Audita Querela.*

If an Infant acknowledgeth a Recognizance, Statute Merchant or Staple, he cannot avoid this without *Audita Querela* be brought before his Full age; becauſe in ſuch Caſe of Record his Nonage ought to be tryed by Inſpection, and theſe concern but perſonal Duties: But if an Infant bargain and ſell Land by Deed indented and inrolled, he may avoid this when he pleaſeth without *Audita Querela*, becauſe it is Real. *Vid. ſupra & infra.*

Error.

Of Error brought by Infant to reverſe Judgment, Fine and Recovery, *vide infrà tit. Fine, Recovery, &c.*

In Treſpaſs by Infant *per* Guardian, the Defendant pleads the Plaintiff was above 16 years old, and agreed for 6 *d.* in hand paid, that the Defendant have Licence to take four Ounces of her Hair. The Plaintiff demurred: And *per Cur'* its no Plea; for the Infant cannot Licenſe, tho' ſhe may agree with the Barber to be Trimmed, 3 *Keb.* 389. *Scroggan* verſ. *Stewardſon.*

It has been a queſtion, Whether the Statute of 21 *Jac. c.* 16. *Of Limitations*, extends for to ſave the Rights of Infants to Actions on the Caſe: And in *Chandler* and *Violet*'s Caſe, *p.* 22 *Car.* 2. *B. R.* it was held that it did, and that the ſaid Action is within the Equity of the ſaving Clauſe of it, tho' it be named in the Limiting Clauſe only. Infant by his Guardian declares upon two Promiſes, that the Defendant was indebted to him in 50 *l.* and 12 *l.* for Moneys by the Defendant to the uſe of the Plaintiff, *ante tempus illud habit' & recept'*; and being ſo indebted, he promiſed to pay theſe Moneys. The Defendant pleads in Bar *Non aſſumpſit infra ſex annos.* The Plaintiff replies, That at the time of the Promiſe, and alſo of the Bill exhibited, he was and yet is an Infant of the age of 21 years. Defendant demurs; and adjudged *pro Quer'*: For the Intention of the Act was not to preſerve a pety Action in the Caſe for Slanderous words, in reſpect of Infancy, and not to ſave an Action for an Infant for a real Duty, as here was. And the Court was of Opinion, That this Saving extends to all Actions on the Caſe; for there

Statute of *Limitations*, how it extends to Infants.

is

is a Saving of Treſpaſſes generally, and all Actions on the Caſe are Treſpaſſes, *ſcilicet*, Treſpaſs on the Caſe; and the Infant may purſue his Action at any time within age, tho' the years limited by the Statute are elapſed during his Nonage, *Siderf.* 453. 2 *Saund.* 121. *Chamber* and *Violet.*

Appeal. Appeal was brought by Infant *per* Guardian, and at the Day in Court the Guardian was demanded, and tho' he was ſick the Court would not give Day over; for that may not be in Appeal, *Latch. p.* 173.

*Preſidents.*

Infant Suing by Guardian.

Admiſſion to ſue *per Gardianum* ſſ. T. B. qui infra etatem viginti & unius annorum exiſtit per B. ſ. Gardianū ſuū p Curiam dom̃ Regis hic ſpecialiter admiſſus Queritur de, &c.

Infant replies his Infancy to a Plea of *non Aſſumpſit infra ſex annos.*

Infancy reply'd to a Plea of *Non aſſumpſit infra ſex annos.* Et p̃d Thomas dicit q̃d ipſe p aliqua, &c. p̃cludi non debet, Quia dicit quod ipſe idem Thomas tempore confectionis ſeperalis p̃miſſion & aſſumpc̃on p̃d necnon die exhibitionis Bille ipſius Thome p̃d ſcilt p̃d 23 die Octob Anno viceſimo primo ſupradicc fuit infra etatem viginti & unius annorum videlt apud H. in Com̃

Com ꝑdict' Et hoc paratus est verificare, &c.

E. Saunders.

ADmissio querent' infra etatem existen' ad ꝓsequend' p̃ ꝓximos amicos suos versus M. H. gen' in partitione faciend'. Brownl. Rediv. 391. Admittion to sue *per prochein Amy.*

## CHAP. VI.

### *Actions brought againſt Infants.*

*Action of* Waſte *lies againſt him being Tenant for Life or Years.* Ceſſavit *lies againſt him. How Debt lies.* Inſimul computaſſet *in no caſe lies againſt him. Action on* Diſceit *lies not againſt him. Torts* Vi & armis *lye againſt him. He is puniſhable for Judicial Perjury. Diverſity as to* Torts. *If* Trover *and* Converſion *lies againſt an Infant. Action of* Debt *for Rent, how it lies againſt him, or not. How Infant may avoid Leaſe and Rent. Action lies againſt him for Neceſſaries.* Audita Querela, *in what caſes it lies againſt an Infant.*

IN Actions brought againſt Infants, how he ought to appear by Guardian, and not by Attorney, or *Prochein amy. Vide ſuprà.*

Yet if an Infant appears by Attorney in *Treſpaſs* or *Ejectment*, and had a Verdict, Judgment was reverſed, 1 *Keb.* 184. *Whitacre* and *Pellington.*

*Quære*, If it be holpen by the Statute of 12 *Jac. Of Jeofails. Vide Stat. Car.* 2.

Waſte. Infant being Tenant for Life, or Years, ſhall be puniſhed for doing or ſuffering Waſte.

*Ceſſavit.* Where Infant claims by purchaſe, a *Ceſſavit* lies againſt him, if he pay not his Rent by two years; and if he have the Tenancy by

by diſcent, and he himſelf ceſs, a *Ceſſavit* lies, *Plow. Com. Stowel's* Caſe, 1 *Inſt.* 380. 381.

Action of *Debt* lies not againſt Infant, without ſhewing how it aroſe, (as ſuppoſe for Neceſſaries) an *Inſimul computaſſet* in no caſe lies againſt him, 2 *Keb.* 581. *Mod. Rep.* Debt.

The Court, in *Siderfin*, *p.* 258. in *Johnſon* and *Pye's* Caſe, made this difference: Tho' Infants ſhall be bound for their actual Torts, as Treſpaſs, &c. which are *vi & contra pacem*, yet they ſhall not be bound by thoſe which ſound in Diſceit; and therefore Action on the Caſe lies not a gainſt an Infant on his affirmance that he is within Age. 1 *Keb.* 908. Torts. Diſceit.

The Infant ſealed a Deed of Mortgage to the Plaintiff, (he was 20 years and an half old, and appeared to be of Full age,) and affirmed himſelf to be of full Age; and he after avoided this for Infancy to the Plaintiffs damage, &c. and *Not Guilty* was pleaded. *Per Keeling*, The Judgment will ſtay for ever, or elſe the whole Foundation of the Common Law will be ſhaken; for this was but a ſlip, and he might have pleaded his Minority, 1 *Keb.* 778. *Johnſon* and *Pye's* Caſe.

And *George* and *Nevill's* Caſe, cited in *Siderfin*, *p.* 258. is to the ſame purpoſe. Which was: Action on the Caſe was brought againſt an Infant for affirming a Jewel to be his own, which was not; and the Defendant pleaded Infancy, and the Plaintiff demurs, and it was adjudged for the Defendant; for be the Jewel his own or not, the Plaintiff

was not bound by his affirmation, *Sid.* 258. *George* and *Nevill*'s Caſe.

Judicial Perjury. But it was there agreed, That if Infant judicially perjure himſelf in point of Age, or otherwiſe, he ſhall be puniſhed for the Perjury.

So you may obſerve a difference between Torts *vi & armis*, and Torts *ex cauſa Contractus*.

Trover and Converſion If one delivers Goods to an Infant by Contract, &c. knowing him to be an Infant, the Infant ſhall not be charged in Trover and Converſion for them. *Aliter*, If Goods be delivered to an Infant, not knowing him to be an Infant, *Sid.* 129. *Manby* and *Scot.*

*Sed Quære* of this; for if he be an Infant, the knowing him, or not knowing him to be ſo, alters not the caſe.

It was the Opinion of ſome, That an Infant is chargable for a Tort; and therefore Trover and Converſion being a Tort, an Infant is chargable with it, and that therefore Trover lies againſt him, and he cannot plead *deins age*.

Torts, diverſity. But we muſt diſtinguiſh of Torts; for as to ſuch which are *Vi & armis*, an Action lies againſt Infant: But ſuch Torts which concern Contract, Lending, Finding and Converſion, the Original Cauſe whereof is not *Vi & armis*, or ſuch as ſound in Deceipt, no Action lies againſt him. But,

In an Action on the Caſe and a Trover brought againſt an Infant, as againſt a Common Carryer (as they may be joyned in one Action; for *Not Guilty* anſwers both; but

Trover

Trover and *Assumpsit* cannot be joyned) and the Defendant pleads, he was an Infant at the time of the Conversion: To which the Plaintiff demurred. This Plea prevents a Discontinuance, but is not good as to the Trover; and therefore Judgment for the Plaintiff in the Action on the Case. Its pleaded, the Defendant was an Infant at the time of the Conversion; which being pleaded in bar to the whole prevents any Discontinuance, 3 *Keb.* 59. *Owen* and *Lewis*. *Qu.*

*Action sur le Case.*

Discontinuance in pleading.

It hath been controverted, whether and how Action of *Debt* lies against an Infant for Rent? As to that, *Ketly's* Case was this:

Debt for Rent.

Action of *Debt* was brought for Rent on a Lease for years. The Defendant pleads in Bar, That at the time of the Lease made he was within Age. Plaintiff demurs. *Per Cur.* A Lease to an Infant is not void, but voidable; for if it be for the Infants benefit, be that Benefit apparent or implied, it shall be void in no case *primâ facie*, 21 *H.* 6. 31. *b.* But the Infant may make it void at his Election; for he may, before the Rent-day come, refuse and wave the Land, for otherwise such Lease would be more strong than a Fine on Record; and if more Rent be reserved than the value of the Land, he ought to have set it forth: But in the principal Case it was not shewed, that the Rent was of greater value. And, Secondly, the Defendant was of Full age before the Rent day came. And its clear, if Infant doth not enter and manure

How an Infant may make a Lease void.

the Land, no Action of *Debt* lies againſt him, 1 *Brownl.* 120. *Ketley's* Caſe. 11 *Jac.*

Infant may wave his Demurrer, and plead to Iſſue.

Debt was brought againſt an Infant for Rent arrear on a Leaſe made to him: The Defendant demurs to the Declaration, and afterwards waved his Demurrer, and pleads to Iſſue. *Per Cur'*, Infant may wave his Demurrer at another Day, after he hath Demurred, and plead to Iſſue; but this ought to be in the ſame Term; and agreed, that the Infant ſhall be chargable with the Rent.

As for the Law in Actions againſt Infants, for Neceſſaries, *Vid. infra* tit. *Contracts.*

Infant not charged as Bayliff, or Receiver.

One under the Age of 21 years ſhall not be charged as Bayliff or Receiver to any man; becauſe by intendment of Law, before his Full age, he has not skill or ability to raiſe or make any Improvement of Lands, Goods or Chattels, 1 *Inſt.* 172.

*Audita Querela* againſt two, where of one is Infant.

If a Statute is acknowledged to two, whereof one is an Infant, and they make a Defeaſance, and after ſue Execution againſt it, the *Audita Querela* ſhall be brought againſt them both: For it doth not appear within the Deed that he is an Infant, (alſo the Deed of the Infant is not void) and peradventure he will affirm it, 48 *Ed.* 3. 12. *b.*

CHAP.

## CHAP. VII.

### *Of Fines levied by Infants.*

*Where Infant ſhall be bound by a Fine,* & è contra. *Diverſity between Matters of Record done or ſuffered by an Infant, and Matters in Fact. How and in what manner, and when he ſhall avoid a Fine. Of his Declaration of Uſes upon a Fine, where good and where not. Where the Heir ſhall avoid the Fine for the Nonage of the Anceſtor, or not. Infant Levies a Fine to the King;* Quid operatur. *Where Infant ſhall be bound by Fine and Non-claim, or not; and how the Five years ſhall be accounted. What act ſhall bar an Infant from Reverſing a Fine during Nonage. Where the Infants Heir may Reverſe a Fine after his Death. Of a Fine being Reverſed for the Nonage of the Wife, and whether the Coniſee ſhall retain it during the Coverture. Of Commiſſioners taking a Fine of an Infant, how puniſhable or not. What act or thing ſhall bar an Infant to Reverſe a Fine. The manner of reverſing a Fine by a* Feme Covert *within Age. How it ſhall be done, when Infant and one of full Age joyn in a Fine; and the Operation of Law thereon. The Husband not admitted to diſavow the Guardian aſſigned for his Wife in Error, to Reverſe a Fine.* Quære, *if he can releaſe the Error; And what is to be done if the Husband will not ſuffer Proceedings in a Writ of* Error.

IT is agreed by all, that where an Infant Levies a Fine it ſhall bind him, (that is, till it be judicially Reverſed;) and as to the

Reaſon why Infant is bound by his Fine.

reaſon and manner of their being ſo bound, tho' they have a natural Diſability, my Lord *Hobart*'s Notion is very fine: 'The Reaſon '(ſaith he) why Infants are bound by their 'Fines, is not becauſe the Law binds ſuch 'perſons; but becauſe the Law finds them 'perſons not ſo diſabled, neither does it ad-'mit the averment of ſuch Diſability, for 'that it is certified by the indiſputable Credit 'of the Judge, that they were perfect and 'able perſons: And ſo here is a Law of Po-'licy, that doth not cancel the Law of Na-'ture, but doth only bound it in point of 'Form and Circumſtance, it being better to 'admit a Miſchief in particular, even againſt 'the Law of Nature, than an Inconvenience 'in general; and it is not the Law of Na-'ture to admit any improbable Surmiſe 'againſt authentick Record or Evidence.

Fine by Infant not void, but voidable. No averment, that he was within age.

So that a Fine Levied by an Infant is not void, but voidable. But an Infant ſhall not be received to aver that he was within Age; for this would be againſt the Record of the Court.

Diverſity between Matters of Record done or ſuffered by Infant, and Matters *en fait*.

To this purpoſe is the known diverſity between Matters of Record done or ſuffered by an Infant, and Matter *en fait*: For Matters *en fait* he ſhall avoid either within Age, or at full Age; but Matters of Record, as Statutes-Merchant and of the Staple, Recognizances acknowledged by him, and Fine levied by him, and Recovery againſt him by default in Real Actions (ſaving in Dower) muſt be avoided by him; (that is to ſay) Statutes and other Obligations on Record by

*Audita*

*Audita Querela*, and the Fine and Recovery by Writ of *Error*, during his Minority. And the Reaſon thereof is, becauſe they are Judicial acts, and taken by a Court or Judge; and therefore the Nonage of the party to avoid the ſame, ſhall be tryed by the inſpection of the Judges, and not by the Country; and becauſe his Nonage muſt be tryed by Inſpection, this cannot be done after his full Age.

What voidable by *Audita Querela*, and when.

The reaſon of Inſpection.

And ſo is *Moor*, *fo.* 75. *Worley*'s Caſe: If Infant acknowledges a Recognizance, or levy a Fine, he ſhall not have *Audita Querela* nor a Writ of *Error* at his full Age, unleſs he Reverſe it during his Minority; for when he is of full Age, the Court cannot judge by Inſpection of what age he was at the time of the Coniſance; and by his Surmiſe only, the Law will not ſuffer that to be Reverſed, which was ſo ſolemnly and lawfully done. But if he ſtill continue within Age, ſo as the Court may compare the Time of the Action brought with the time of the Acknowledgment, if they judge him within age by Inſpection, they will Reverſe the Fine, and ſo alſo the Statute, *Mo. fo.* 75. *Worley*'s Caſe.

And there is not any means to Reverſe a Fine, but by Inſpection; (and therefore its uſual at this day to take a Fine of Infants a little before their full Age, for that then they have not any time to Reverſe it) but by Inſpection the Court may inform themſelves, and by other Teſtimonies alſo, 1 *Bulſtr.* 206. *Butts* and *Jenning*'s Caſe. *Vide infra titulo Trial.*

Now

Fine may be reverſed after full age, if it be recorded that he was within age.

Now if the Age be inſpected by the Judges, and it be Recorded that he is within age; albeit he come of Full age before the Reverſal, yet may it be Reverſed after his Full age, as is *Kechwiche*'s Caſe, cited 1 *Inſt.* 380.*b.*

He muſt be inſpected to Reverſe a Judgment.

And as it is in the Caſe of a Fine, ſo it is in a Judgment. If the Infant bring a Writ of *Error* to Reverſe a Judgment againſt him in an Action of *Debt*, becauſe he then was, and ſtill is an Infant. In this caſe he muſt be inſpected by the Court.

Error brought to Reverſe a Fine during Infancy and pleading.

As to Error brought to Reverſe a Fine during Infancy, the Infancy was aſſigned, and here ſhe was inſpected, *i. e.* in *B. R.* and on *Scire facias* againſt the Defendant he pleads *in nullo eſt erratum*, and the Fine was Reverſed. Now it is not uſual to reply *in nullo eſt erratum*, but to leave it to the Court, *Mich.* 25 *Car.* 2. *B. R. Oakover*'s Caſe.

By *Hales*, If Error be well aſſigned in Fact, *In nullo eſt erratum* confeſſeth it; but if it be Matter in Law, there muſt be a Demurrer, and *in nullo eſt erratum* is ill. But if the Error in Fact be not well aſſigned, (as that in Fact he did not appear at ſuch a Day, which being againſt the Record, is not well aſſigned) and ſo not confeſſed: But this Matter of Fact being well aſſigned, the Fine was Reverſed.

The bringing a Writ of *Error* to Reverſe a Fine by Infant during his Nonage, is not ſufficient; but the Fine by Judgment in the Writ of *Error* muſt be Reverſed during his Nonage, *Godb.* 120. 1 *Inſt.* 380.

If

If the Infant dye before the Reverſal, his Heir ſhall be bound by it, and he cannot Reverſe it, becauſe this ought to be by Inſpection, which cannot be when he is dead, *Winch. p.*104. Infant die before the Reverſal, his Heirs are bound by it.

So by *Hales*, in *Parker* and *Primate*'s Caſe, 27 *Car.*2. *B.R.* a Fine is levied by Infant, and ſhe lived to Full age, it is unavoidable; and if ſhe dye within age, it is alſo unavoidable, it not being avoidable but by Error during her Minority, and till the Fine be Reverſed, its not avoided by Evidence of Miſdemeanor.

So is *Co.*12. *Rep. Ann Hungate*'s Caſe expreſs. If the Fine be not Reverſed during the Minority of the Heir, the Fine is unavoidable in in Law, and the Heirs of the Infant have not any Remedy by the Law to reverſe it; becauſe it muſt be tryed by inſpection of his Perſon. Fine muſt be reverſed during Minority.

But there is another diverſity to be obſerved as to Matters of Record; that is, between a Statute, &c. and a Deed inrolled; for he may avoid a Deed inrolled at his Full age: For in this caſe nothing paſſeth by the Inrolment, but all by the Deed before, 2 *Inſt.*673. Difference between a Statute and a Deed inrolled.

Now the Law which allows the Fine levied by the Infant, allows him likewiſe to declare the Uſes by his Deed, as being a part of the Operation of the Fine; and this Declaration ſhall bind ſo long as the Fine remains in force. So of a man of *Non ſane memorie*, 2 *Rep.*58. *Beckwith*'s Caſe, 1 *Roll. Rep.* 730. *Spring* and Sir *Julius Cæſar*. Infants declaring Uſes upon a Fine.

And if an Infant Levy a Fine, and declares the Uſes when he comes of Full age (the

(the Fine not being Reverſed) he ſhall be bound by the Deed that leads the Uſes of the Fine, as well as by the Fine it ſelf. For they make but one Aſſurance.

But it has been queſtioned, When Infant makes an Indenture to declare the Uſes of a ſubſequent Fine; and after *A.* levies another Fine generally, whether he may avoid it? I conceive its all but one Aſſurance, and ſo ſhall bind, as in the other Caſe of a ſubſequent Declaration, *Mod. Rep.* 252.

If Infant covenant by Indenture to Levy a Fine, and that this ſhall be to certain Uſes, and dies within age; the Limitation of the Uſes ſhall bind the Heir of the Infant, as well as the Infant himſelf, ſo long as the Fine continues not Reverſed; 1 *Roll. Rep.* 730.

And ſo it was Reſolved in the *Star-Chamber*, That an Infant having levied a Fine, may declare the Uſes upon it; and ſuch Declaration is good notwithſtanding his Nonage, 2 *Leon.* 159.

And Mr. *Plowden* affirmed it was ſo adjudged in his own Caſe, by which he loſt Lands of the yearly value of 40*l.*

If Infant Levies a Fine to the King, and declares the Uſes of it by his Deed; it ſhall bind him, *Hob.* 224.

Where a Fine ſhall be reverſed by the Heir of the Infant, after his death.

Now, where it may be Reverſed by his Heir after his Death, we muſt know: If the Infant is inſpected and dies before the Fine is Reverſed; yet after his Age adjudged and recorded, his Heir in that caſe ſhall Reverſe the Fine for the Nonage of the Anceſtor, *ut ſupra*. *Mo.* 844. *Keckwith's* Caſe.

As

As to the Infants being bound by the Fine of their Anceſtor; tho' the Iſſue be an Infant, yet foraſmuch as he is privy, and out of all the Savings of 4 *H.* 7. he is bound by the Fine of his Anceſtor.

But as to the Infants being bound by Fine and Non-claim, or not, the Caſe of *Stowel* and *Zouch* is a *Leading Caſe*. The Caſe was: *Zouch* diſſeiſed the Grandfather of *Stowel*, of Lands in Fee, and Levies a Fine with Proclamations, and *Stowel* the Grandfather lives three years after, and dies; *Stowel* his Grandſon and Heir being then ſix years old, who enters at his full Age. And the Queſtion was, Whether he ought not to have entred during the firſt Five years from the levying the Fine, part of which was attached in the Grandfather; or whether he has time to Enter at his full Age? And it was Reſolved in the *Exchequer-Chamber*, That notwithſtanding his Infancy, yet he ought to have entred within the Five years after the Fine levied; which he not doing, but ſtaying till he came to Age, is barred by the Statute of 4 *H.* 7. *c.* 24. For the Exception is of ſuch Infants or perſons as had Right at the time of the Fine levied, and no others; and *Stowel* the Grandſon had no Right at the time of the Fine levied; but the Grandfather had the Right then, againſt whom the Statute takes place: And the Heir within age is bound to purſue his Right before his full age, becauſe he had no preſent Right at the time of the Fine levied; ſo that he ſhall not have a new 5 years after his full age, but the 5 years commenced in the time of

How Infant bound by Fine and Non-claim, or not.

of *Stowel* the Grandfather ought to be continued without Interruption. By the first Saving, the Heirs shall be as general as the Saving, and shall comprehend Heirs within age. And in this Case the Grandson is not within the 1st Saving, because it is saving to others. Now the word [*Others*] is exclusive of those comprized in the Exception. And Old *Stowel* his Heirs were comprized in the first Saving, because he had Right at the time of the Fine ingrossed, which Right is saved to him and his Heirs upon Condition, that they pursue their Right within five years, which was not done: And by the word [*Priement*] *Stowel* the Grandson had no Right first came to him, for any Cause or Title, before the Fine levied, as the Law-makers intended it: For they intended a Special Cause, which was the Cause Efficient to have the Right, and such Right was not in any other, but first in him; and the Disseisin which was before the Fine, was no Matter or Cause to make *Stowel* to have the Right. For if the Disseisin had not been, he had had the Right and Possession by discent. And the Reason why *Walsh* changed his mind, who was of the contrary Opinion at first, is to our purpose; for that the Act which had limited the Time, had made a Condition to the Right of *Stowel* the Grandson, (*viz.*) That he ought to pursue his Claim within the five years attached first in the Grandfater; of which his Nonage shall not discharge him no more, than if a man make a Feoffment in Fee upon Condition on the part of the Feoffee

Feoffee and his Heirs to be performed; if the Feoffee dies, his Heir within age, he is bound to perform the Condition during his Non-age, as well as if he had been of full Age. And this Conſtruction was made in this Caſe, for the quieting and repoſe of mens Eſtates, which Univerſal Benefit the Law prefers before the priviledge of Infancy; which tho' it may in ſome few Caſes be a prejudice to the Infant, yet the other is more to be favoured, *Plowd.* 354. *Zouch* and *Stowel.*

But in *Dyer* 133. Tenant in Tail, Remainder in Fee to a Stranger; Tenant in Tail levies a Fine with Proclamations; he in the Remainder dies, his Heir within age, and afterwards Tenant in Tail dies without Iſſue; ſo as a Title to have a *Formedon* in Remainder accrues to the Infant, who ſuffers five years to paſs after his Title accrued; yet he may bring his Action after five years, becauſe the Statute of 4 *H.* 7. *Of Fines*, ſaves his Claim till of full age, and then he ſhall have five years, *Dyer* 133.

What acts ſhall bar an Infant from Reverſing a Fine during his Non age.

But in ſome Caſes an Infant may do ſuch acts as ſhall bar him to Reverſe a Fine during his Non-age: As if Infant bring a Writ of *Error* to Reverſe a Fine, levied by himſelf during his Nonage; and is inſpected by the Court and found within age; which is Recorded by the Court, and afterwards (before the Fine Reverſed) he levies another Fine to another; this ſhall bar him to have the Fine reverſed. But it was adjudged *contra*, becauſe the ſecond Fine was not pleaded, *Mich.* 38 & 39 *El. B. R. Hart*'s Caſe.

If

If Infant levy a Fine, and take back the Eſtate in Life or in Tail by Render, he ſhall not have a Writ of *Error* to adnul the Fine; becauſe he himſelf is ſeiſed of the Land, and ſo without remedy, *Mo. p.*44.

Infant levied a Fine, acknowledged before the Chief Juſtice, and the Coniſees would not demand the Fine to be Ingroſſed until his full age: And now the Infant comes with the Note of the Coniſance, and prays that he may be admitted to a Writ of *Error*, and to the Examination of his Age: And the Judges agreed to it, and made Entry of it, and by this they would ſave the advantage to him, *Mo.* 189.

Infant and one of full Age joyn in a Fine; how the Reverſal ſhall operate.

I ſhall now conſider how the Law ſtands, when an Infant and one of full age joyn in a Fine, how the Reverſal of the Fine ſhall operate: And alſo when Baron and Feme levy a Fine, and one is within age, and how the Coniſee ſhall detain or make Reſtitution.

It is adjudged in the Caſe of one *Engliſh*, cited in 1 *Rep. Bredon*'s Caſe: Tenant for Life, Remainder in Fee to an Infant; they both joyn in a Fine, and they both bring a Writ of *Error:* It ſhall be Reverſed as to the Infant, and ſtand good as the other, and the Coniſee ſhall have the Land for the Life of the Tenant for Life, *Engliſh's* Caſe 1 *Rep. Bredon*'s Caſe. *Alitèr*, in the Caſe of *Baron* and *Feme.*

And to this purpoſe is *Pigot* and *Ruſſel*'s Caſe: Leſſee for Life, and he in Reverſion, joyn in a Fine to a Stranger, and he in Reverſion reverſeth the Fine for Non-age. Two Points were adjudged: Firſt, That he ſhall

ſhall not enter for the Forfeiture, becauſe he joyned in the Fine and conſented to it.

Secondly, He alone may bring his Writ of *Error* to Reverſe it, for its brought of an Error in Fact (*viz.*) his Non-age, *Cro. El.* 115, 124. *Pigot* and *Ruſſel.*

Two Infants levy a Fine, how reverſable.

And ſo it was adjudged in *Pigot* and *Harington's* Caſe; and its there agreed, That if two Infants levy a Fine, they may ſue ſeveral Writs of *Error*, or joyn in one Writ; but they ought to aſſign Errors ſeverally, 1 *Leon.* 317.

Fine by *Baron* and *Feme*, the *Feme* being within age, how reverſed, and the conſequence.

If a Fine be levied by *Baron* and *Feme*, the *Feme* being within Age, and in Error brought the Fine is reverſed for the Non-age of the Wife, the *Baron* and *Feme* ſhall have Reſtitution preſently, and the Coniſee ſhall not detain it during the Coverture; for all the Eſtate paſſeth from the Wife. *Worſley* and *Charnock's* Caſe, cited 2 *Rep.* 77. *Lord Cromwell's* Caſe.

But this Caſe is more fully reported in 1 *Leon.* 114. And the Queſtion was, if the Fine ſhould be utterly reverſed, or ſhould be reverſed only as to his Wife, and ſhould ſtand good againſt the Husband? And two great Preſidents were cited, one contrary to the other. They that Argued, that the Fine ſhould be reverſed for the whole, cited *Ely* and *Ford's* Caſe, *P. B. H.* 8. A Fine was levied between *R. Ely* Plaintiff, and *N. Ford* and *Jane* his Wife Deforceants, the Wife being within age; and Judgment was given *quod Finis præd' adnulletur* and *pro nullo penitus habeatur*, and that the *Baron* and *Feme*

ſhould be reſtored; and thereupon a Writ iſſued to the *Cuſtos brevium*, to bring into Court the Foot of the Fine, and it was preſently cancelled in Court.

The other Preſident cited contrary to this was 7 *Eliz. Baron* and *Feme* levied a Fine, the Husband died the Wife being within age; the Wife took another Husband, and they brought a Writ of *Error*, and the Wife by Inſpection was adjudged within age, and the Fine was Reverſed as to her and her Heirs only. But indeed the ſecond Husband was a Stranger to the Fine, and ſo it might ſeem abſurd to reverſe it as to him: But in the Principal Caſe it was adjudged, that the Fine ſhould be reverſed as to both; for the whole Eſtate moved from the Wife, and all paſſeth out of her; and Judgment was given *quod Finis præd' reverſetur.* And by *Gawdy*: We cannot by this Reverſal make the Coniſee to have a particular Eſtate, during the Life of the Wife. *Ideò penitus reverſetur.* 1 *Leon* 114. *Worſley* and *Charnock.*

The Huſband not permitted to diſavow the Guardian aſſigned for his Wife, to reverſe a Fine. *Quære*, Of a Releaſe by the Huſband.

A *Feme Covert* Infant levied a Fine, and her Friends got a Writ of *Error* in her and her Husband's Name; yet the Court would not ſuffer her Husband to releaſe; by *Twiſden.* But by *Hales*: I cannot ſee how that can be avoided; but (he ſaid) he had known in ſuch caſe, that the Court would not permit the Husband to diſown the Guardian which they admitted for his Wife, 1 *Ventr.* 209.

A

A *Feme Covert* levied a Fine within age; ſhe was inſpected by the Court, and adjudged within age; whereupon a *Scire facias* iſſued to the Terr-tenants, who pleaded ſhe was of full age at the time of the Fine levied. Upon which Plea Iſſue was joyned, and a Trial had at the Aſſizes, and a Verdict for the Plaintiff, who came into Court, and now prayed Judgment. *Per Glyn*, The Court is to judge of her Infancy, and not the Jury; and tho' the proceedings are not duly, yet they do no hurt. And the Fine was reverſed, *Stiles* 472. *Vidian* and *Fletcher*.

Full age of a *Feme Covert*, as to a Fine tryed by a Jury, and ill.

*Vide Trial infrà.*

## *Of Commiſſioners taking a Fine of an Infant.*

If Commiſſioners do take a Fine of an Infant, yet the Court will not ſet it aſide. It was *Herbert Parrot*'s Caſe. A *Feme Covert* (his Wife) at 20 years of age Levied a Fine before Commiſſioners in the Country, and the Wife dies without Iſſue; ſhe had ſetled the Eſtate upon her and her Husband, and the Heirs of their two Bodies. The Court was moved to ſet it aſide; but they agreed they could not meddle with it: But if the Wife had been alive, and under age, they might bring her in by *Habeas Corpus* and inſpect her, and ſet aſide the Fine upon Motion; or perhaps the Husband would not ſuffer the bringing or proceedings in a Writ of *Error*. And the Commiſſioners in this caſe were not fined, becauſe they could not diſcern whether ſhe was of age by the View,

The Fine not to be ſet aſide.

What is to be done, if the Huſband will not ſuffer proceedings in a Writ of *Error*.

ſhe being 20 years of age; but if it had bee apparent by Inſpection that ſhe was withi age, then they ought to have been fined 2 *Ventr. pag.* 30. *Perrot's* Caſe, *Mod. Re* 246.

To this purpoſe is a Notable Caſe in *Coke* 12 *Rep. Anne Hungate's* Caſe in the *Star Chamber*; and in that Caſe, foraſmuch as n corruption and circumvention was prove in the Commiſſioners, the Fine ſtood good and it was not there apparent to the Com miſſioners that he was within age, he wantin but ſix Weeks of his age: But if the Com miſſioners had had knowledge he had bee within age, it had been a Miſdemeanor i them.

Commiſſioners, in what caſes fineable.

And ſo was *Cavendiſh's* Caſe, cited there The Commiſſioners did perfectly know tha the *Feme Covert*, who levied the Fine, wa within age; and for this Cauſe every on of them was fined. But the Fine ſtood good and not reverſed, 12 *Rep.* 122. *Anne Hun gate's* Caſe, *&* 1 *Roll. Rep.* 113. *meſne Caſe.*

It was the Opinion of *Coke*, in 2 *Brown* 271. If Commiſſioners by force of a *Dedimus poteſtatem* take a Fine of an Infant they are fineable and ranſomable to the valu of the Lands.

But in *Requiſh's* Caſe 2 *Bulſtr.* 320. and *Moor* 840. the Court was more favourable to the Commiſſioners, and to the Infant *Requiſh*, of whom the Fine was taken, was a Infant of the age of twenty years and three Quarters: The Commiſſioners had no No tic

tice that he was within age, and by inſpection they could not perceive. *Per Cur. in Camera-Stell'*, This was a Fault in them, but not a Crime; and they were not puniſhed. *Requiſh* upon Proof made by the Church-Book, was adjudged within age, and the Fine was avoided; and the Court *ex aſſenſu partium* did take upon them the ſetting and diſpoſing of his Lands in ſuch manner as he ſhould not ſell them, but to his youngeſt Brother; becauſe of his Simplicity, 2 *Bulſtr.* 320. *& Moor* 844. *Requiſh*'s Caſe.

And becauſe this is a Matter of great weight, (*viz.*) the paſſing of Lands away by a Fine, many times to the ſubverſion and alienation of fair Eſtates, from ancient Families; and yet the ſolempnity of a Fine is ſo great, that I ſhall cite one caſe more, which is in *Dyer* 220. *b. Carel*'s Caſe; but more fully reported in *Co.* 12 *Rep.* 124. A *Feme Covert*, of the Age of Nineteen years, acknowledged a Fine before Commiſſioners (ſeveral Judges being in Town, who might have Examined her.) She died on Friday in *Eaſter-Week*; but the Fine and Queens Silver was Entred as of laſt Term, (*viz.*) *Hillary*, four Days before the Death of the Wife; and the Orignal Writ of *Covenant* bore Date the 15*th* of *January*, Retornable *Craſt. Purificat'*, and the *Dedimus poteſtatem* the 18*th* Day of *January*, 12 *Rep.* 124. *Carryl*'s Caſe.

Undue means in gaining a Fine.

In *Dyer* it ſeems, That the ingroſſing this Fine was ſtopt for undue Means in gaining it: But in the 12*th Report*, before the Judges in the *Star-Chamber*, the Husband, who perſuaded the Wife, was not puniſhed, tho' he knew his Wife was within Age. And *per Cur.* the ſaid Fine is good, and orderly Sued out, and available and effectual in the Law, *Dyer* 220.

CHAP.

## CHAP. VIII.

### *Of Common Recovery, and other Matters of Record ſuffered by Infants.*

*Infants permitted to ſuffer Recoveries by the Court. And the Reaſons thereof. The manner of paſſing ſuch Recoveries. Recovery ſuffered by Infant of 4 years of Age. If Infant appear by his Guardian and ſuffer a Common Recovery, it cannot be reverſed for Error. But if in ſuch a Caſe he appear by Attorney, it may be reverſed after his full Age, and why. And if he appear in perſon it may be reverſed within Age, but not after full Age, and why. Difference where Infant comes in on ſingle Voucher, and where on double Voucher. Recovery by Infant in perſon, may be avoided in Error before full Age, but at full Age he cannot avoid it by Entry. Judgments in Courts not to be ſubverted by matters in* pais. *If Infant ſuffer a Recovery by Attorney, he in remainder may Vouch it for Error, and why. The appearance by a* Feme Covert *within Age in a Recovery by Attorney is Error.* Regula *as to* Baron *and* Feme, *as in reſpect of the Inheritance of the Wife, being impeached by the Husband. Difference between Matters of Record, and Matters of Fait as to their being void, or voidable for Infancy, and how and when to be avoided. Infants ſhall avoid Matters in Fait within Age, or at full Age. Statutes and Recognizances are avoided by* Audita Querela. *Fines, Recoveries and Judgments are avoided by Error. By* Au-

dita Querela *during Minority.* Audita Querela *where brought in* B. C. *or in* B. R. Audita Quer. *by Infant, to Cancel a Recognizance how to be brought. In* Audita Querela, *Judgment was reverſed for Error in Proceedings, no new* Audita Querela *lies at full Age, and the Reaſon. Re-inſpection not of force, but in the ſame Court where the firſt inſpection was.* Audita Querela *lies upon Judgment againſt Infant-Bail upon a Recognizance. If the Recognizance is avoided by* Audita Querela, *Judgment upon it is avoided alſo. Infant cannot enter into a Recognizance to diſcharge himſelf of Execution. Judgment by default cannot be avoided by Infant at his full Age. Infant confeſſeth a Judgment, how to be avoided; who ſhall take advantage of Infancy.*

AN Infant may ſuffer a Common Recovery at the diſcretion of the Court, as is reſolved in *Mountjoy Blunt's* Caſe, before the Lord Chief Juſtice *Hobart*, it being adjudged convenient by himſelf (he being at the Age of 10 years) and his Truſtees; and divers Preſidents are there cited of the like nature, *Hob.* 196, 197.

Infant permitted to ſuffer a Recovery by the Court, and why.

So was the Caſe in 1 *Leon* 211. In Covenant for further aſſurance, it was deviſed, that for further aſſurance and cutting off a Remainder, a Common Recovery ſhould be ſuffered, in which an Infant ſhould be Tenant to the *Præcipe*, and ſhould Vouch the Vendor; and becauſe the Recovery was intended to be to the uſe of the Infant and his

his Heirs, it was prayed, That ſuch a Recovery might be received and allowed. At the firſt the Juſtices were doubtful what to do; but at laſt upon Affidavit made, that the ſaid intended Recovery was to the uſe of the Infant, and upon appearance of a good and ſufficient Guardian for the Infant in the Recovery, who was of Ability to anſwer to the Infant, if he ſhould be deceived in the paſſing the Recovery, the Recovery was received and allowed. And as to the manner of paſſing ſuch Recoveries, *Stapleton*'s Caſe, in *Cro. Eliz. p.* 471. ſpeaks fully. The Caſe was: 1 *Leon.* 211.

The manner of paſſing ſuch Recoveries.

Tenant in Tail in conſideration of the Marriage of his eldeſt Son, Covenanted to ſtanſt ſeiſed to the uſe of himſelf for Life, and after to the uſe of his eldeſt Son for Life, and after to the uſe of the firſt Son of his eldeſt Son in Tail; the Grandfather afterwards would ſell part of the Land, and the Purchaſer would not take any aſſurance, unleſs the Infant who was but 4 years of Age would ſuffer a Common Recovery: And yet it was conceived that that Covenant did not alter any Eſtate; but to ſatisfie the Purchaſer, he prayed a Guardian might be allowed to the Infant, that a Recovery might be ſuffered againſt him as Vouchee, whereto the Court agreed; and therefore admitted a Gentlemen there preſent (the Infant being brought into Court) to be Guardian for him, and then a Recovery was had of that Land at the Bar, wherein the Infant was vouched, and he by his Guardian appeared and vouched the common Vouchee. It

Recovery ſuffered by Infant of 4 years of Age.

It was a great Queſtion in *Raby and Robinſon's*, *Sid.* 321. Whether, when an Infant ſuffers a Common Recovery in perſon, he may avoid it, for Error after his full Age. For it was agreed, That if Infant appear by his Guardian, and ſuffers a Common Recovery, that this is good, and ſhall not be reverſed for Error, according to the Lord *Newport's* Caſe, *Cr. Car.* 301. *Hob.* 196. For the Judgment is not given upon default of the Infant, but upon departure of the Vouchee in deſpight of the Court. So that *Mary Portington's* Caſe ſeems in this point not to be Law, tho' the Report in *Rolls* ſeems to confound it ſelf, *Cr. Car.* 301. 1 *Rolls Abr.* 754. *Lord Newport's* Caſe.

If Infant appear by his Guardian and ſuffer a Recovery, it cannot be reverſed for Error.

If the Infant appears by Attorney and ſuffers a common Recovery, It was agreed in *Raby and Robinſon's* Caſe, That this may be reverſed for Error after his full Age, becauſe it ſhall be tried *per pais*. Whether the Warrant of Attorney was made by him when he was an Infant, and ſo is *Aylet's* Caſe. *Stiles* 246. And this is the true Reaſon why Judgment ſo obtained againſt Infants, may be reverſed after their full Age, (*ſcilicet*) becauſe the Tryal is there not by inſpection but by *pais*. Tho' in ſuch caſe it is worſe for the Purchaſers, than a Fine levied by an Infant; for 40 years after this it may be alledged for Error, that he that gave the Warrant of Attorney was an Infant, 2 *Ke.* 40. *Stiles* 246. *Aylet's* Caſe, *Cr. Eliz.* 569. *Moor* 46. 1 *Inſt.* 380.

If Infant appeared by Attorney and ſuffers a common Recovery, it may be reverſed after his full Age, and why.

But now where the Infant appears in perſon and cannot be Tryed but by Inſpection, the party being at full Age, the Tryal fails, and therefore it was reſolved, that this cannot be aſſigned for Error, becauſe he ought to be Tryed by Inſpection; and it is no greater a miſchief than if a Fine had been levied by Infant, that after his full Age it is unavoidable.

But if he appear in perſon it cannot be Reverſed after full Age, and why.

The principal Caſe of *Raby and Robinſon* was this: Error was brought of a Common Recovery on a Writ of Entry, by *Præcipe* againſt *R.* of Lands in *G.* who vouched *E.* the Plaintiff in the Writ of *Error*, who enters in the Warranty and voucheth *H.* and ſo a Recovery paſſed, *G.* being an Infant.

And ſo was *Darcy and Jackſon's* Caſe: Error was brought of a Recovery againſt a Feme Infant who appeared by Attorney. And it was adjudged, That it being by Attorney ſhe might Reverſe it, but *contra* if it had been in perſon. * In the caſe of *Raby and Robinſon* there was a diſtinction ſtarted; where the Infant comes in upon ſingle Voucher that ſhall bind him, becauſe he comes in upon the Warranty of his Anceſtor; but if an Infant come in upon double Voucher, that ſhall not bind him, becauſe he comes in upon his own Warranty, but this difference was not allowed.

*Difference where Infant comes in on ſingle Voucher, and where upon double.

† But Note, Tho' ſuch Recovery wherein Infant Vouchee comes *in propria perſona* (and not by Attorney or Guardian) does not bind him, but that he may avoid it in a Writ of *Error*, for that it is Error in Law; yet at his full

† Recovery by Infant in perſon, may be avoided in Error before full Age, but at full Age he cannot avoid it by Entry.

full age he may not enter into the Land and avoid it by his Entry, before he has reverſt it by a Writ of *Error*; becauſe he himſelf is privy to the Judgment, and may not reverſe it by ſuch means. For Judgments are not to be ſubverted by Matters *en pais*, without Matter of Record; as Recognizance or Fine by an Infant, nor any Judgment in other Action given againſt Infant, where he appears by Attorney, and not by Guardian, 1 *Rol. Abr.* 742. *Aylet*'s Caſe.

Judgment, not to be ſubverted by Matters *en pais*.

If Tenant in Tail within age is Vouched, who appears by his Attorney, he in Remainder may aſſign this for Error; for that he is privy to the Judgment in regard of his Intereſt, and the appearance by the Infant by Attorney is void, 1 *Rol. Abr.* 755. *Holland* and *Lee*.

If Infant ſuffer a Recovery by Attorney, he in Remainder may vouch it for Error.

The appearance by a *Feme Covert* (in a Recovery) within age by Attorney, is Error. And tho' it may be Objected, That the Husband is of full age, and therefore he may make Attorney for himſelf and his Wife, the Law is not ſo: For the Rule of it is, That the Husband cannot give away or loſe the Inheritance of his Wife; but it muſt be given or loſt by her ſelf, or her own act; and ſhe ought to appear by Guardian, notwithſtanding the full age of the Husband, who is to be joyned for conformity with her. But *quære*, if it be void, or voidable, *Sid.* 322. *Bridgm.* 75. *Holland* and *Jackſon*.

The appearance by a *Feme Covert* (in a Recovery) within age by Attorny, is Error. *Regula*, as to *Baron* and *Feme*.

The Form of the Entry of the Suit, or of the defence by a Guardian in a Recovery, *Vid. ſupra tit. Guardian*.

In

In the next place I ſhall conſider of other Matters of Record, done or ſuffered by Infants, and where they are void or voidable; and if they are voidable, how to be avoided, and where.

And as to this, take this Diverſity as a General Rule, as it is ſet down 1 *Inſt.* 380. *b.* which is this:

The difference is betwixt Matters of Record done or ſuffered by Infants, and Matter *en fait*: For Matters *en fait* he ſhall avoid within age, or at full age; but Matters of Record, as Statutes Merchant and of the Staple, Recognizances acknowledged or Fines levied by him, Recovery againſt him by default in all real Actions (except Dower) muſt be avoided by him during his Minority, *viz.* Statutes by *Audita Querela*, and Fines and Recoveries by Writ of *Error*; for there it muſt be tryed by Inſpection, 1 *Inſt.* 380. *b.* 2 *Inſt.* 673.

Difference between Matters of Record and Matters of Fact.

Infant ſhall avoid Matters of *fait* within age, or at full age.

Statutes, Recognizances, &c. avoided by *Audita Querela*, Fines, Recoveries, Judgment by Error.

By *Audita Querela* during his Minority.

So is *Mary Portington*'s Caſe, 10 *Rep.* 43. If Infant acknowledge a Statute or Recognizance, this is not void, but voidable by *Audita Querela* during his Minority; for in this caſe Judges may know by Inſpection, whether he be within age, 10 *Rep.* 43. *Portington*'s Caſe.

*H.* was bound to *W.* in a Statute Staple of 600 *l.* *H.* then being under the Age of 21 years: *H.* at 23 years of age brings *Audita Querela* upon this matter. But *per Cur. Nil capiat per breve*; for now he cannot be tryed by Inſpection, whether he be within age or not. And this is the Rule; notwithſtanding

ſtanding in *Fitzherbert* it ſeems to the contrary, 1 *Anderſon* 104. *Hariſon* and *Wiley*.

Infant may have *Audita Querela* upon a Statute Staple, notwithſtanding the Statute is not Certified or Retorned into any Court; elſe the Certificate may not be Retorned till after he comes of Age, and then he cannot be aided, 1 *Anderſ.* 228.

Now that the Writ of *Audita Querela* muſt be ſued whilſt the Infant is within age, appears by the words of the Writ:

**Mandamus, &c. Dō ſi vobis legitimè conſtare poterit ipſum T. &c. tempore recognitionis prō infra etatem extitiſſe & adhuc exiſtere tunc Audita Querela ipſius T. in prmiſſis faciatis fieri hō de jure & ſecundum legem, &c. fuerit faciend', 1 *Anderſ.* 158.**

An Infant ſhall avoid an Extent upon a Statute of his Anceſtor by *Audita Querela*. The Caſe was:

A Feoffment in Fee by Deed Indented, rendring Rent, with a Clauſe of Diſtreſs, and after was bound in a Statute; and the Day being incurred Execution was awarded to the Coniſee; and upon the Extent the Sheriff retorned, That the party was dead, and that he had extended the ſaid Rent, the Heir of the Coniſor being within age, becauſe the Rent was extended during his Nonage, brought *Audita Querela*. *Per Dyer*, The Writ is well maintainable; for that there is

an

an Exception in the Writ of *Extent*; yet if the Lands are diſcended to an Infant, that he ſhall ſurceaſe to extend, *Mo.p.*37.

*Audita Querela* was brought in the *Common Pleas*, for that the Cognizor was within age at the Acknowledgment; and it was adjudged to be well brought there, 1 *Leon.*303. and ſo it is in the *Kings-Bench*, *Cro.El.*308.

*Audita Querela* well brought in *B.C.* or in *B.R.*

Infant enters into a Recognizance, and brought *Audita Querela* within age in the *Common Pleas*, and upon Inſpection was adjudged within Age, and a *Scire fac'* awarded againſt the Coniſee; and upon one *Nihil* only retorned, the Judgment was, That the Recognizance ſhould be cancelled. The Coniſee brought Error in the *Kings Bench*; for there ought to be two *Nihils* retorned: For two *Nihils* amount to a Garniſhment, and without Garniſhment and *Oyer* of the Coniſee, it ought not to be adjudged to be Cancelled; and it was reverſed for this Error. Whereupon the Coniſor, when he was at full age, brought another *Audita Querela* in the *Kings Bench*, and ſhews how only the firſt Judgment was reverſed for Error in the Proceedings, and not in the Principal Matter. The Coniſee hereupon Demurs.

*Aud. Quer.* by Infant to cancel a Recognizance, how to be brought.

Two *Nihils* amount to a Garniſhment.

*Per Cur.*

1. The *Audita Querela* lies not; for the Judgment of the Reverſal is general, and not for any ſpecial Cauſe; but the party ſhall be reſtored to all that he loſt by the former Judgment, and ſo the Recogniſance ſet on foot again.

In *Aud. Quer.* Judgment was reverſed for Error in Proceſs, no new *Aud. Quer.* lies at full Age, and the reaſon.

2. The

Inſpection not of force, but in the ſame Court where it was.

2. The Judgment of Inſpection, tho' it is not but an Award, yet it is not of force but in the ſame Court where the Proof by *Teſte* and Inſpection was; and this ſhall not conclude the Judges in the *Kings Bench*, but that they ought to have a re-inſpection, which cannot be in this Caſe; becauſe the Plaintiff in the *Audita Querela* is of full age.

And further, If in this Caſe upon the firſt Judgment reverſed, the Coniſee being within age, had brought a new *Audita Querela* in the *Common Pleas*, he ought to be newly inſpected, becauſe this is a new Original, and all the former proceedings are diſſolved by the reverſal of the Judgment, *Yelv.* 88. *Randal* and *Wale*, *Winch.* 106. This Caſe cited and miſ-reported.

*Aud. Quer.* lies upon Judgment againſt Infant Bail, upon a Recognizance.

But *Audita Querela* lies upon Judgment againſt the Bail within Age on a Recognizance. The Caſe was: *M.* was Bail for *S.* in debt brought by *T.* and *M.* was within Age. Judgment paſſed againſt *S.* and he did not render his Body: And upon two *Scire facias*'s and *Nihil* retorned againſt *M.* (the Infant Bail) Judgment was given againſt him, and he brought *Audita Querela*, becauſe he was within age. *Williams* Juſtice was againſt it, and ſaid, He ought firſt to have Error to reverſe the Judgment; for during the Judgment is in force, the Recognizance is affirmed. But, *per Cur.* then *M.* is without remedy, and at great miſchief, if he may not have *Audita Querela*; for it may be the Judgment had no Error in it, and upon the *Scire facias* *M.* the Bail could not have pleaded his Infancy

Infancy; for this Suit goes in affirmance of the Recognizance, and demands execution of it, but yet the Error of the Infancy remains; and here, by the *Audita Querela*, the Recognizance being avoided for Infancy by Inſpection, the Judgment upon it is avoided alſo, *Yelv.*155. *Markam* and *Turner.*

If the Recognizance is avoided by *Aud. Qu.* Judgment upon it is avoided alſo.

Infant being in Execution upon Condemnation in Debt, brought a Writ of *Error*; his Father and his Brother were his Bail. *Per Cur.* They two ſhall only enter into the Recognizance, that the Infant ſhall appear; and yet if the Judgment be affirmed, that they ſhall pay the Money, and not that they ſhall render the Body of the Infant again to Priſon; for when once he is diſcharged of the Execution, he ſhall never be in Execution again, 3 *Leon. p.*113. *Tucker* and *Norton.*

Infant cannot enter into a Recognizance to diſcharg himſelf of Execution.

Judgment by Default cannot be avoided by him at full Age, for the Reverence due to Records; and the ſame Ground is laid 9 *Rep.* 30.*b.* But,

Judgment by Default in a *Formedon* againſt an Infant in B.R. was reverſed by Inſpection, *Paſch.*6 *H.*8.*Rot.*22.

Judgment by default cannot be avoided by Infant at full Age.

If a Judge takes a Recognizance of an Infant, or Infant levies a Fine there, becauſe it is an act Judicial, there the Infant muſt reverſe it during Non-age; but where it is not tryed by Inſpection, there it may be tryed after his death, or at any time, being Matter *in fait.*

*Formedon* brought againſt Infant in B. C. and he confeſſeth the Action, and he brought Error in B. R. after which he comes of full

Age; becauſe his Confeſſion was made Judicially, and recorded by the Court upon his appearance, it ought to be reverſed during his Non-age: But if it were on Default, he may reverſe it, becauſe he never came into Court by reaſon of the Default, ſo as the Court may view him, *Palm.* 247. *Darcy* and *Jackſon.*

Infant confeſſeth a Judgment; how to be avoided.

As to Infants entring into Judgments, and avoiding them, he ſhall not have *Audita Querela.* The Caſe was:

*Randal* had married the Daughter of Juſtice *Clench*; he being an Infant, confeſs'd Judgment in Action of Debt brought againſt him in B. R. and now he brought *Audita Querela* during his Non-age. *Per Cur.* It lies not in this Court, as it ſhould upon a Statute or Recognizance (becauſe he never was Viewed,) but the party ſhall have Error; but not in B.R. but in the *Exchequer Chamber*, by the Statute of 27 *Eliz.* *Mo.* 460. *Randal's* Caſe.

## *VVho ſhall take advantage of Infancy.*

He in Remainder may aſſign the Infancy of Tenant in Tail, for Error; for tho' they in Remainder are not Privies in Blood nor Eſtate, yet they are parties to the Record, and that is ſufficient.

The Rule in *Whittingham's* Caſe 8 *Rep.* is, That none ſhall take advantage of Infancy, but Privies in Blood. But this Rule admits of Exception.

If

If two Joyntenants, Infants, make a Feoffment, the one dies, the other ſhall avoid the whole by Entry (tho' not by Action) for the Eſtate was joynt in Right, and the entire Right ſurvives.

Tenant in Tail within Age makes a Feoffment, and dies without Iſſue, the Donor may enter, and good reaſon; for the Feoffment of the Infant ſhall not put him to a *Formedon* by Diſcontinuance; and then if he ſhould not enter, he ſhould be without remedy. And the Opinion of *Coke* in 8 *Rep.* is denied for Law; but the Lord by Eſcheat may not enter for Infancy, *Palm.* 254. *Darcy* and *Jackſon.*

If Infant appear in perſon, he ſhall be tryed by Inſpection, and he only ſhall avoid it; but if he appear by Attorney, all perſons ſhall aſſign this for Error, and it ſhall be tryed *per Pais*, Palm. 247.

## CHAP. IX.

### *Of Conveyances and Specialties.*

*Feoffment by Infants, what are void or voidable; and the time of avoiding ſuch Feoffment. His Heir ſhall avoid it, tho' a Special Heir.* Baron, *within Age, makes a Feoffment of the Wives Land, and dies; ſhe may Enter, but the Entry of the Heir is taken away by Corruption of Blood.* Baron *and* Feme, *within Age, make a Feoffment, and* Baron *dies; what Remedy for the ſame. Two Joyntenants, within Age, make a Feoffment in Fee, and one dies; Entry into the whole accrueth to the Survivor: But if one had only made a Feoffment in Fee, the Right ſhall not ſurvive, and why. What Privies ſhall avoid a Feoffment of the Infant-Anceſtor. Bargain and Sale may be avoided by Entry at any time. The Nature of a Bargain and Sale Inrolled. Of Exchanges by Infants. What ſhall be ſaid an Affirmance or an Agreement to an Exchange. Attornment by Infant good, and why. Infant ſhall be compelled to Attorn. How Infants are bound by Partition, or not. By what acts a voidable Partition ſhall be made good. Leaſes made by Infants voidable: If without any Rent or Recompence void. Leaſe made by one Joyntenant within Age, who dies, is void, and the other ſhall avoid it. Leaſe made by Infant, to try a Title, void.* Ne granta pas, *where a good*

Plea.

*Plea. Where Infants Leaſe is void for want of Privity; but his Confirmation ſhall be good. The actual Surrender of an* Intereſſe termini *by an Infant is void. His Surrender by acceptance of 2d Leaſe is void. Copyholds granted by Infants good, and why. Infant Surrenders his Copyhold Land, he may enter at his full Age. Releaſe by Infant, how void or not. What Obligations by Infants are voidable, and what void. How Infant bound by Covenant, or not. Of Conveyances, Leaſes, Bonds, &c. made to Infant. Infant may purchaſe. Grant to a reputed Son, good; but not to an illegitimate Iſſue before birth. Leaſe to an Infant is voidable, and how.*

IN the next place I ſhall conſider of Matters *en fait* done by an Infant, and how he ſhall be bound by them or not, and whether they are void or voidable. And herein I ſhall firſt treat of ſuch acts done by him in reference to Lands or Tenements; as Feoffment, Bargain and Sale, Exchange, Surrender, Leaſes, &c. or in reſpect of Specialties.

If an Infant make a Feoffment, it is voidable, but not *ipſo facto* void; yet note, ſome Books take this difference: Feoffment by Infant voidable or void, with a diverſity.

If Infant make a Feoffment in Fee and delivers it with his own hands, this is but voidable; but if it be executed by Letter of Attorney it is void, as being a Diſſeiſin to him; and the Feoffee is a Diſſeiſor, 2 *Brownl.* 248.

So

So it is agreed in 9 *H.*6.6. and in ſuch caſe of a Feoffment it is not material of what Age the Infant is that makes it; for be he within the age of Diſcretion, as 10 years or 5 years; or above the age of Diſcretion, as 16 or more, the Feoffment is not void, but voidable, 9 *H.*6.6.

It's a Rule, *If the firſt delivery of a Deed be not void, but the Deed only voidable, a ſecond Delivery ſhall not make it good.*

As if an Infant make and deliver a Deed, and after at full Age deliver it again; this ſecond Delivery is void, becauſe the Deed was voidable by Plea, and not void, 8 *H.*6.7.

But by *Roll.* 1 *Abr.* 730. it ſeems, if it be made by Letter of Attorney it is good: But I conceive it is meant, That it is not void.

The time of avoiding a Feoffment.

Now for his time of avoiding it, the Law is; If an Infant make a Feoffment, &c. he may Enter within Age, or at any time after his full Age; and ſo may his Heir, 1 *Inſt.* 248 *a.*

The Infants Heir ſhall avoid it.

And it ſhall be avoided by a Special Heir. Contrary of Warranties Eſtoppels, Conditions, &c.

And to the Avoidance by the Heir of the Infant, Note a Special Heir ſhall take advantage of the Infancy of the Anceſtor. As if Tenant in tail of an Acre of Burrough-Engliſh, makes a Feoffment in Fee within age, and dies, the youngeſt Son ſhall avoid it; for he is privy in Blood, and claimeth by diſcent from the Infant. So if Tenant in tail to him and the Heirs Females of his Body, makes a Feoffment in Fee, and dies within Age, having Iſſue a Son and a Daughter, the Daughter ſhall avoid the Feoffment

Where-

Whereupon we may obſerve, That a Cauſe to Enter by reaſon of Infancy, is not like to Conditions, Warranties and Eſtoppels, which ever diſcend to the Heir at the Common Law, 1 *Inſt.* 337.b.

If a Woman Inheretrix taketh an Huſband who is within age, and he being within age makes a Feoffment of the Tenements of his Wife in Fee, and dies, the Entry of the Wife is congeable; for the Husband might well Enter notwithſtanding ſuch Feoffment during the Coverture, and he could not enter but in right of the Wife, and this Right of Entry remaineth to his Wife after his deceaſe.

*Baron* within age makes a Feoffment of the Wives Land, and then dies; the Wife may enter.

But the Entry of the Infant is only in reſpect of the Right that he hath; for if an Infant is Tenant *pur auter vie*, and makes a Feoffment in Fee, and *ceſtuy que vie* dies, the Infant himſelf ſhall not enter; for now he hath no Right at all. And,

The entry of the Infant is only in reſpect of the Right.

If Tenant in tail within the Age of 21 years makes a Feoffment in Fee, and after is attainted of Felony and dies, the Entry of Iſſue is not lawful; for his Entry is not lawful in reſpect of his Eſtate only, but of his Blood alſo, which is corrupted; and therefore in that caſe he is driven to his *Formedon*.

Entry of the Heir taken away for corruption of of Blood.

If the Husband and Wife be both within age, and they by Deed indented joyn in a Feoffment, reſerving a Rent; the Husband dieth, the Wife may Enter or have a *dum fuit infra ætatem*: But if ſhe were of full age ſhe ſhall not have a *dum fuit infra ætatem*

*Baron* and *Feme* within age make a Feoffment, and *Baron* dies, what remedy for the *Feme*.

for the Non-age of the Husband, altho' they be both one perſon in the Law.

Two Joyntenants within age make a Feoffment in Fee, and one dies, entry into the whole accrueth to the Survivor.

If two Joyntenants within age make a Feoffment in Fee, and one of the Infants dies and the other ſurviveth, the Right of Entry accrueth to him that ſurviveth, and he may enter into the whole; and becauſe they might joyn in a Writ of *Right*, the Right ſhall ſurvive: But they ſhall not joyn in a *Dum fuit infra ætatem*; for the Non-age of the one is not the Non-age of the other.

If one had made a Feoffment in Fee, the Right ſhould not ſurvive, and why.

And in this caſe, if one Joyntenant had made a Feoffment in Fee, the Right ſhould not have ſurvived, for the Joynture was ſevered for a time; but if two Joyntenants be, and one is of full Age, and the other within Age, and they both make a Feoffment in Fee, and he of full Age dieth, the Infant ſhall enter, or have a *Dum fuit infra ætatem* for the Moiety.

What Privies ſhall avoid a Feoffment of the Infant Anceſtor.

Note, None ſhall avoid the Feoffment of the Infant, when Livery is made with his own hands; but only he himſelf, or his Heirs, which are Privies in Blood inheritable, and neither Privies in Law, nor Privies in Eſtate.

Leaſe made by 2. Joyntenants and one dies, the ſurvivor ſhall avoid it.

And therefore if two Joyntenants are within age, and one makes a Leaſe for years and dieth, the other ſhall avoid it; for the Leaſe is utterly void, of which every Stranger ſhall take advantage: But if there are two Infants Joyntenants, and the one leaſeth for

for Life and makes Livery in perſon and dieth, the other ſhall not avoid it. Two Joyntenants, the one maketh a Feoffment upon Condition and dieth, the other ſhall not take benefit of the Condition, 2 *Leon.* p.218.

Feoffment by Infant no forfeiture. *Aliter* of a Fine.

Infant, Tenant for Life or years, makes a Feoffment in Fee, its no forfeiture; for if the Leſſor entreth, Infant may enter upon him again. *Aliter*, if it be by Matter of Record. If Infant be Leſſee for life, and levies a Fine, it is a Forfeiture, and if Leſſor enters, Infant ſhall not enter again. So if Infant commit Waſte, which is againſt a Statute, its a forfeiture; and if Leſſor recovers the places waſted, Infant ſhall not enter again, 8 *Rep. Whittingham's* Caſe, *Godb.* 365.

Bargain and Sale may be avoided by entry at any time.

A Bargain and Sale of Lands by an Infant may be avoided when he will, by his Entry; for a Bargain and Sale inrolled is no Record, nor *Nul tiel Record* pleadable to it, its only a Deed inrolled for better Evidence. But my Lord *Coke* gives another Reaſon in 2 *Inſt.* 673. If Infant bargain and ſells Lands, which are in the realty, by Deed indented and inrolled, he may avoid it when he will; for the Deed was of no effect to raiſe an Uſe, and the Statute of Inrolments of Bargains and Sales, is intended of lawful and effectual Bargains and Sales, and ſuch as would have raiſed a Uſe at Common Law, and doth only reſtrain the Execution of them that be of effect, except the Deed be inrolled, 2 *Inſt.* 671.

*Per*

Bargain and Sale by Infant, and a Fine thereupon.

*Per totam Curiam:* If Infant by Indenture bargain and sell his Land for Money, and after levies a Fine *come ceo, &c.* this Indenture is not void, but voidable, and the Use shall pass by the bargain, and then the Fine being levied; by this the Bargain is irrevokable unless by Error, *Mo. p.* 22.

Exchange by Infant.

If Infant makes exchange of Land for less Value than his own Land that he gave in exchange, it shall not bind him; but at his full Age he may make it good by Agreement, 12 *H.* 4. 12. But an Exchange by Infant is good until he defeats it, 12 *H.* 4. 13.

What shall be said an Affirmance or Agreement to an Exchange.

Now, as to what shall be said an Affirmance or Agreement to the Exchange, you must know, That if an Infant exchange Land with another, if he continue in the Land given in exchange at his full Age, he hath affirmed the Exchange, and shall never avoid it afterwards, 16 *Ed.* 3. 2.

So is 1 *Inst.* 51. *b.* If the Infant exchange Land, and at full Age occupy the Land taken in exchange, the Exchange is become perfect by this; for the Exchange at first was not void, because this amounts to a Livery, and also in respect of the recompence, but it is only voidable.

Attornment by Infant good, and why.

Attornment by an Infant to a Grant by Deed is good, and shall bind him:

1. Because it is a lawful Act.
2. He gives away no Interest from himself.
3. It is to perfect a thing; tho' he is not upon the Grant by Deed compelled to Attorn.

Yet

Yet if Infant hold Lands by Purchaſe or Deſcent, he ſhall be compelled to Attorn in *per quæ ſervitia*, and this is no miſchief to the Infant; for when he comes of full Age, he may diſclaim to hold of him, or he may hold, he holds of him by leſſer Services. But it would be a greater Miſchief to the Lord, to loſe his Services in the mean time: And if Infant be Leſſee, he ſhall be compelled to Attorn in a *Quid juris clamat*, 1 *Inſt.* 85. a.

Where Infant ſhall be compelled to Attorn.

Now as to an Infants being bound by Partition, or not, and by what acts it ſhall be made good, the Law ſtands thus:

How Infants are bound by Partition, or not.

If the Partition be equal at the time of the Allotment, it ſhall bind the Infant for ever; becauſe he is compellable by Law to make Partition, neither ſhall he have his Age in a *Partitione facienda*. And tho' the Partition be unequal, and the Infant hath the leſſer part; yet is not the Partition void, but voidable by his Entry: For if he takes the whole Profits of the Unequal part after his full Age, the Partition is made good for ever, 1 *Inſt.* 171.

By what acts a voidable Partition ſhall be made good.

A Partition made by the Kings Writ, *De Partitione facienda*, by the Sheriff, by the Oath of Twelve Men, and Judgment thereupon given, ſhall bind the Infant, tho' his part be unequal; for the Judgment is, that the Partition ſhall remain *firma & ſtabilis*.

But a Partition in *Chancery* ſhall not bind the Infant.

What

*What Leaſes, Releaſes or Surrenders, ma*
*Infants, are void, or voidable only.*

Leaſes made by Infants, voidable.

Grants of Infant where himſelf hath nefit, (*viz. quid pro quo*) are only voida as if he letts Lands for years, reſervi Rent.

*Vide infrà in fine hujus Capitis*, *Ke* Caſe.

Infant Leaſeth for years, and Leſſee e the Infant may have Treſpaſs againſt 18 *Ed.*4.14.*b.*

Where Infants Releaſe is void for want of Privity. But his Confirmation ſhall be good.

Infant letts Lands to another for 21 y and after the Grantee granteth Lands to ther for Ten years; if the Tenant a Age releaſeth to the Grantee of the L it is void, becauſe there is no privity: in this he confirms his Eſtate, it is good; if the Infant had granted all his Eſta another his Releaſe had been good, 1 *Inſt. Lit. ſect.*547.

Leaſe by Infant, without any rent or recompence, void. *Ne grant a pas*, where a good Plea.

If a Leaſe be made by an Infant wi Rent, Profit or other Recompence, the is utterly void. As if he grant a Re Advowſon, &c. he may ſay, That he di grant, &c. for the thing included in the doth not paſs, altho' he delivereth the of Grant with his own hand. *Aliter* Feoffment.

Leaſe made by one Joyntenant *deins age*, who dies, is void,

If two Joyntenants are within Age, one makes a Leaſe for years and dieth, other ſhall avoid it; for the Leaſe is v void, of which every Stranger ſhall advantage: But of acts voidable, it is o

ſe. As two Infant Joyntenants, the one aſeth for life, and makes Livery in perſon d dieth, the other ſhall not avoid it, 2 *Leon.* 7,218. *Humfreſton*'s Caſe. And the other ſhall avoid. *Regula:*

Infant of the age of Six years entreth into e Land, and leaſed the ſame to the Plain- for years, to try a Title in Ejectment; d tho' it was made upon the Land to try a itle, which is a good Conſideration and ofit to the Infant; yet it is void. *Quære.* *Leon.*218. Leaſe made by Infant to try a Title.

Infant made a Leaſe for years rendring ent, and when he came to his full Age, he d to his Leſſee, *God give you Joy of it.* It s held by *Mead* Juſtice, That the Leaſe s affirmed and made good, becauſe tho w ſaith, he hath a Recompence, 4 *Leon.* .4 Leaſe affirmed.

Leaſe for years, Remainder for years ren- ing Rent by Infant, and at full Age he ac- pts the Rent of the particular Tenant, its good Confirmation of the Eſtate of him in emainder; ſo that ſuch Leaſe is not void, r if it were it is not good, *Com.*545.

It was a Queſtion in *Aſhfield* and *Aſhfield*'s aſe; Infant, Copyholder in Fee, makes a eaſe without Licenſe, not warranted by the uſtom, rendring Rent; at full Age he ac- pts the Rent, and after ouſts the Leſſee; eſſor brings Ejectment. Whether this Leaſe affirmed by Acceptance? Which is doubt- l in *Godb.* but in *Noy* 92. Reſolved, it is irmed by Acceptance, and that ſuch a For- iture ſhall not bind the Infant, *Noy* 92. *Aſh-* ld's Caſe, *Godb.*456.

The

The actual surrender of an *Intereſſe termini* by Infant, is is void.

The actual Surrender of a future Int or *intereſſe termini*, by an Infant, is void; a Surrender of an Infant cannot be by D but it is actually void; and a Surrende acceptance of a ſecond Leaſe is void, bec it is without increaſe of his Term, or creaſe of his Rent. The Caſe was:

Surrender by acceptance of a ſecond Leaſe, is void.

A Leaſe for 99 years was made by a D and Chapter, 1 *Ed.* 6. to begin at the Feaſt the *Annunciation*, after the end of a Leaſe of made *Anno* 35 *H.* 8. This Leaſe being ſigned to *J. S.* and *W. S.* Infants of El years of age, they 29 *Eliz.* (which was fore the end of the Term of 50 years) tak new Leaſe of the ſame Lands from the D and Chapter for the ſame Term, and the ſame Rent, and upon the ſame Con tion; and after the end of the ſaid Te of 50 years, the Infants being of full enter, and hold by the ſecond Leaſe, pay the Rent accordingly to the Dean Chapter, which they accept for divers yea and afterwards a new Dean and Chap cauſe an Entry to be made, to avoid Leaſe. And it was adjudged, That the S render and Acceptance by the ſecond Le is void, *cauſa qua ſupra. Cro. Car.* 502. *L* and *Gregory.*

If Infant ſurrender a Leaſe to him in R verſion, this is void, and may not be ma good by any Agreement at full age, 1 *R Abr.* 728.

## *As to the Infants Grants of Copyhold Eſtates, &c.*

If Infant, Lord of a Mannor, grants Copyholds, it ſhall be good, and ſhall bind him, 4 *Rep* 23. 8 *Rep.*63. for neither Infancy, nor *Non ſane memorie*, nor Coverture, nor other ſuch Diſabilities of perſon; neither in reſpect of the exility or uncertainty of the Eſtates of the Lords, as at will, or upon Condition, &c. ſhall not avoid Grants by Copy: And the Reaſon is, for that the Eſtate of the Copyholder is not derived out of the Eſtate of the Lord of the Manor; for he is but an Inſtrument to make the Grant; but the Cuſtom of the Manor, after the Grant made, eſtabliſheth it to the Grantee. And tho' the Grant be now the Title of the Copyholder, yet the Cuſtom of the Manor is the main Foundation on which is built the whole Fabrick of the Copyhold Eſtate, which the Cuſtom doth confirm to the Copyholder, and the Law will ever allow and ſupport it, notwithſtanding any ſuch Imperfections in the Grantor's perſon; as Infancy, Outlawry, &c. And by *Noy*, ſuch Grants by Infants ſhall be good, as well as Preſentation to a Benefice, 4 *Rep.* 23. 8 *Rep.* 63. 1 *Inſt.* 58. *b.* 8 *Rep. Swain's* Caſe, *Noy* 21.

Copyholds granted by Infants are good, and why.

If the Infant enfeoff me of a Manor, tho' he may enter upon me at his pleaſure, yet Grants made before his entry ſhall not be avoided by any ſubſequent Entry: Nay, ſuch Grants are ſo favoured in Law, that if a man eſpouſeth

Grants made before his entry into a Manor, not to be avoided.

eſpouſeth the Lady of a Manor under the age of Conſent, and after ſhe diſagreeth, tho' the Marriage by relation is void *ab initio*, yet Copyholds granted before diſagreement ſhall never be avoided, *Owen* 28 *Rouſe's* Caſe.

Infant ſurrenders his Copyhold Land, may enter at full age.

If Infant ſurrender his Copyhold Land within age, he may enter at his full age, without being put to any Suit for it, *Winch.* *p.* 39.

Now for Specialties made by Infants, what are void or voidable, is in the next place to be conſidered.

Releaſe by Infant, void.

A Releaſe by Infant without Conſideration is void; ſo is *Cro. El.* 671. *Knot* and *Barton's* Caſe. Debt on Bond made to the Teſtator, Defendant pleads a Releaſe made by one of the Plaintiffs (Executors). Plaintiff replies, this Releaſe was made without any Conſideration, and he who releaſed was within age at the time of the Releaſe made; and upon Demurrer it was adjudged for the Plaintiff, and that it was a void Releaſe, 5 *Rep. Ruſſel's* Caſe, *Cro. Eliz.* 671. *Knot's* Caſe.

Obligation by Infant is not void, but voiable

If Infant maketh an Obligation, it is not void, but voidable. *Vide infra tit. Pleading*, and *Non eſt factum.*

If Infant make a Bond, and after he is ſued upon it, and the Attorney without Warrant ſuffers a Judgment by *Non ſum informatus*, this is no cauſe to grant an *Audita Querela*; for he ſhall have a Writ of *Error* if he were within age; and if he was not, then

then he ſhall have a Writ of *Diſceit* againſt the Attorney, *Winch. p.*114. *Aſhley* and *Collins.*

The Bond beareth Date when the Defendant (Infant) was within age, but ſealed and delivered when he was of full age; the time of making the Bond ſhall be adjudged when the Bond is ſealed and delivered, and not when it bears Date, 1 *Brownl.*31.

If one pays Money for the Neceſſaries of the Infant, and took Bond of him in double the Sum, its void; but if he had taken Bond for the very Sum it had been good. And ſo the Infant may bind himſelf to pay for Neceſſaries; yet if it be by Bond, or other Writing, with a penalty, it ſhall not bind him, *per tot' Cur.* And, if Infant avoid ſuch a Bond with a Penalty, for his Infancy, as he may, it ſeems that the Contract is not revived, 1 *Rol. Abr.*604. Nay, ſuch a Bond from an Infant doth ſo extinct the Contract, that it is not made good by *Aſſumpſit* at his full Age, 1 *Inſt.*172. *Cro.Eliz.*920. *Ayliff* and *Archdale*, *Godb.*6.219. 1 *Rol.Abr.*729. *Mo.* 679., 3 *Keb.*

If Infant bind himſelf in a Bond with a Penalty, to pay for Neceſſaries, its void, And the Contract is not revived, nor can be made good by *Aſſumpſit* at full age.

Debt on Bond dated 10 *June*, and delivered the 18*th* day of the ſame Month; the Defendant pleads by Proteſtation, that it was delivered the 18*th* day, altho' that at time he was of full age, *Noy p.*32. *Qu.*

If an Infant make an Obligation, and being ſued, thereupon an Attorney without Warrant ſuffers a Judgment by *Non ſum informatus*; if he were within age, he ſhall have a Writ of *Error*; if he were not, he

Attorney *ſans* Warrant ſuffers a Judgment by *Non ſum Informat'* on Bond by Infant, what remedy.

ſhall have a Writ of *Diſceit* againſt the Attorney; but no *Audita Querela*, *Winch.* 114. *Aſhly* and *Collings*.

*Vide infra tit. Pleadings.*

How Infant bound by Covenant, or not.

Infant ſhall not be bound by his Covenant, unleſs for Neceſſaries.

Infant may voluntarily bind himſelf an Apprentice, and he is compellable by the Statute of 5 *Eliz.* to be bound out Apprentice; yet neither by the Common Law, or by any words of the Statute of 5 *Eliz.* a Covenant or Obligation of an Infant may bind him; but by the Cuſtom of *London* it ſhall, *Cro. Car.* 179.

Covenant in Indenture of Apprenticeſhip.

And how far Infants are bound by Covenants, and Apprentices bound, *vid. infra* tit. *Apprentice.*

*Feme* (who was the Miſtreſs) was to teach the Infant to Sing and to Dance, and to find with Meat, &c. and the Infant covenants to ſerve her. The Infant brought Covenant, and aſſigns for breach, That the Defendant did not find Meat, &c. *Per Cur.* Tho' the Covenant of the Infant doth not bind her, yet the Covenant of the Miſtreſs, who is of full age, ſhall bind her ſelf; and an Action well lies, *Sid. p.* 446. *Farnham* and *Atkyns.*

*Vide infra* tit. *Contracts.*

*Of Conveyances, Leaſes, Bonds, &c. made to Infants.*

An Infant hath, without Conſent of any other, capacity to purchaſe; for it ſhall be intended for his benefit, and at his full age he may either agree to it and ſo perfect it, or without any Cauſe alledged, wave or diſagree to it; and ſo may his Heir after him, if he agree not thereunto after his full age, 1 *Inſt.* 2. *b.* Infant may purchaſe.

*Of Eſtates; how they may be limited to Illegitimate Infants, and by what names or deſcription good.*

If a man be Baptized by one Name, and confirmed by another Name, he may be Grantee by the Name confirmed. Name of Confirmation.

If a Remainder is limited to *J. S.* Son of *W. S.* altho' he be a meer Baſtard, and no *Mulier* by the Spiritual Law; yet if he be reputed for his Son, its a good Remainder, *Bloodwel* and *Edwards's* Caſe. To Baſtard Reputation.

If *A.* makes a Feoffment in Fee to the uſe of himſelf for Life, the Remainder to the Iſſue Male of one *Mary Lloyd*, of her Body begotten by *A.* the Feoffor; whether he be lawfully begotten or not, ſo that he be the reputed Son of *A.* it is ſufficient for him to entitle himſelf to ſay, That he is the Son of the ſaid *A.* begotten on the Body of the ſaid *Mary Lloyd*, and that he is ſo reputed in the common Reputation of the Country, Reputed Son.

altho' he was not born nor *in esse* at the time of the Remainder granted; and altho' there are lawful Issues between them, which are *Puisne* to the Bastard; for the person who is to Take is certainly described. For the Bastard of a Woman is certainly known to be her Issue; and this is limited to the eldest Issue, *Mich.* 38 & 39 *Eliz. Blodwell* and *Edwards.*

But a Remainder to an illegitimate Issue (before birth) is void.

If an Estate for Life be made, the Remainder to the Issue of the Body of *J. S.* or of him begotten on the Body of *A. S.* if he hath afterwards an illegitimate Issue, yet this Issue shall never take this Remainder; for that he cannot have the reputation of Issue before his birth, 1 *Inst.* 3. 6.

But if a man has a Bastard, and after by continuance of time he is known for his reputed Son, then a Remainder limited to him, by the name of his reputed Son, is good, *id. ibid.*

Lease to an Infant is voidable.

Debt is brought upon Lease for years, for Arrears of Rent against *R.* The Defendant pleads in Bar Infancy at the time of the Lease made. Plaintiff demurs. The Question was, Whether a Lease made to an Infant was void? It was said, it should be void; for the Rent may be greater than the value of the Land. But *per Cur.* It is voidable only at Election; for if it were for his benefit, it shall no way be void; but the Infant at his election may make it void, by refusing and waving the Land before the Rent-day comes. But in the principal Case it was not shewed that the Rent was of greater value,

and

and the Defendant was at full age before the Rent-day came. Judgment *pro Quer. Cr. Jac.* 320. *Ketſey's* Caſe.

Infants are bound to performance of Covenants in Leaſes, and to Conditions *en fait* or Law, as a man at full age. If Feoffment be upon Condition, if the Feoffor or his his Heirs pay at ſuch a day, &c. an Heir within age ought to pay at the Day. Feoffment to Infant on Condition, that he ſhall not enfeoff *J.S.* Infant within age enfeoffs *J.S.* and re-enters; yet the Feoffor may enter upon the Infant, *Com.* 357. Covenant or Proviſo, That his Bargainee ſhall renew his Leaſe, Aſſignment is made to Infant, Infant is bound by this Covenant and Aſſignment, 2 *Rol. Rep.* 403. *Aſcue* and *Belt's*. Bound by Covenants, Conditions in Leaſes.

If a Leaſe for years be made to an Infant, rendring Rent, the Rent is arrear; and after the Infant comes to full age, and continues the occupation of the Land; this ſhall make him chargable with the Arrears incurred during the Infancy, *Paſch.* 11 *Jac. B. R. Ketle* and *Elyot*.

## CHAP. X.

### *Of Contracts, Promiſes, and other Acts of Infants.*

*Infants bound by Contracts for Neceſſaries, but a Bond for them, with a Penalty, is void. A Bond with Penalty ſo far extinguiſheth the Contract, that it can never be revived. What are accounted Neceſſaries. His Contract for Neceſſaries, for maintainig his Trade, not binding. Debt lies on Promiſe to pay for Neceſſaries.* Inſimul computaſſet *lies not againſt Infant. What Averments are needful in Declarations againſt Infants, for Neceſſaries. Of Reciprocal Conſiderations and Promiſes. Of Promiſes made for and in behalf of an Infant. Promiſe by Infant at full Age to pay, if he forbear to Arreſt him, on a Bond given under Age, not good. Of an Infants other acts, what are binding, ſtated in ſome Rules. Infant buys Neceſſaries for his Houſhold, it ſhall bind him. Vendee of the Goods of an Infant, if he take them, is a Treſpaſſor. How Infant is bound by Sale in open Market. Of Infants ſubmitting to Arbitrament.*

Infants bound by Contracts, for Neceſſaries.

IT is a known Rule, That Infants are bound by their Contracts for Neceſſaries. As *Cro. Jac.* 494. *Whittingham* and *Hill.* But it will be demanded, what are Neceſſaries; and what Actions may be brought for ſuch Neceſſaries; and how the Declaration ſhall be

be laid? And it will be needful to ſhew, what ſhall be a good Conſideration to bind Infants or not, tho' the Conſiderations be Mutual and Reciprocal? And then at laſt to ſhew, by what acts of his own he ſhall be bound? *Cro. Jac.* 494. *VVhittingham* and *Hill.*

We take it for a Rule in general, That if the Contract have but a mixture of Prejudice to the Infant, it ſhall be void.

Bond with a Penalty for Neceſſaries void, but for the very Sum, good.

5 *Jac. B. R. Bendloes* and *Holiday*'s Caſe, An Obligation was made by an Infant, with Condition to pay ſo much for his Apparel; becauſe the Bond was with a Penalty it was adjudged void: But Obligation or Bill for the very Sum laid out, is good enough, *Cro. Eliz. ult. Caſe Ayliff*, 5 *Jac.* B. R. *Bendloes* and *Holiday*'s Caſe.

And the Opinion of *Paſton*, 26 *H.*8.2. was always taken for Obligation with a Condition; nay, Bond with Penalty ſo far extinguiſheth the Contract that it can never be revived; and if he promiſe at full Age to pay it, it ſhall not be good. *Vide ſupra.*

What are accounted Neceſſaries.

Now an Infant ſhall not be bound by his Contract or Bargain for any thing, but for his Neceſſity, (*viz.*) Diet, Apparel, Learning, and neceſſary Phyſick.

Therefore it was adjudged in *Dale* and *Copping*'s Caſe, The Promiſe of an Infant to pay Money for the curing him of the *Falling Sickneſs* is good, and ſhall bind him, 1 *Bulſtr.*

But an Action doth not lye againſt an Infant upon an *Inſimul computaſſet* for Diet, becauſe the Infant may be miſ-reckoned; but if the Infant promiſe a certain Sum for his Diet, there need not be an Averment, it was worth ſo much, *Palm.* p. 528.

*Per Haughton* in *Tyrrel's* Caſe, 2 *Rol. Rep.* 271. If Infant have Houſes, it is neceſſary for him to have them in repair; and yet Contract to repair them, doth not bind him. No Contract binds him, but what concerns his own perſon.

If Infant promiſeth another, That he will find him Meat and Drink, and pay for his Learning, that he will pay him 7 *l. per annum.* Action on the Caſe lies on this Promiſe. And altho' it is not mentioned what Learning it is, yet it ſhall be intended, that that is fit for him, until it be ſhewed to the contrary of the other part; altho' he to whom the Promiſe is made does not intruſt him himſelf, but pays another for it, the Promiſe of re-payment is good, 1 *Rol. Abr.* 729. *Pickering's* Caſe.

Learning, tho' it be not neceſſary *de eſſe*, yet it is ſo *de bene eſſe*; and *omne quod eſt utile eſt aliquando neceſſarium*, 1 *Inſt.* 172. *Palm.* 528. *Pickering* and *Gunning*.

But Contract for Dancing, &c. is not binding, *Sid.* p.

Its ſaid in 3 *Keb.* 387. that an Infant as Houſekeeper, may contract for Neceſſaries, (*viz.*) clear Neceſſaries *convenientia*; tho' they are not neceſſary *quoad eſſe*, yet that for ſuch proviſion he ſhall be chargable: And *Hill* and

and *Blackſtone*'s Caſe is cited there, *Hill.* 15 *Jac.* and ſo was the Reſolution in *Whittingham* and *Hill*'s Caſe.

Error of a Judgment was brought in *Shrewsbury*, in *Aſſumpſit*, to pay ſuch a Sum for Wares ſold. The Defendant pleads he was within Age at the time of the Wares being ſold. The Plaintiff *proteſtando* that he was not within age, *pro Placito*, ſaith he, bought them *pro neceſſario victu & apparatu, & ad manutenentiam familiæ ſuæ.* The Defendant rejoyns, That he kept a Mercers Shop at *Salop*, and bought theſe Wares to ſell again; and Traverſeth, that he bought them *pro neceſſario victu & apparatu.* The Plaintiff demurs, and adjudged for the Plaintiff; and the Error was aſſigned in point of Law, That ſuch buying ſhall not bind an Infant. And *per Cur.* his buying to maintain his Trade, tho' he gain his Living thereby, ſhall not bind him, *Hill* and *Blackſton*'s Caſe, 2 *Rol. Rep.* 49. *Cro. Jac.* 494. *Whittingham* and *Hill*'s Caſe. His buying of Neceſſaries to maintain his Trade, not binding

Action of Debt lies againſt an Infant on his promiſe to pay for Neceſſaries, as Meat, Drink, Lodging and Apparel: But if the Infant and the party, from whom he had theſe Neceſſaries, do come to an Account, and reduce the Debt to a certain Sum, &c. And upon this Account the party brought an Action againſt the Infant for the Money ſtated to be due by the Account. This Action will not lye againſt the Infant; for the Account on which the Action is grounded, is void: For Infants cannot agree to any ſuch Account, Debt lies on Promiſe to pay for Neceſſaries.

*Inſimul computaſſet* lies not againſt Infant.

Account, and ſo *Inſimul computaſſet* lies not againſt him; for the *Aſſumpſit* is upon Account, *Trin.* 24 *Car.* B.R. 2 *Roll. Rep.* 271. *Tirrel's* Caſe.

Infant may bind himſelf in *Aſſumpſit*, for the payment of Neceſſaries, and Action on the Caſe lies upon the Promiſe, 15 *Jac.* B. R. *Tillet* and *Buckſton.*

What Averments are neceſſary in Declarations againſt Infants for Neceſſaries.

Now in Action brought againſt an Infant, it muſt appear in the Declaration that the Apparel was for the Infant himſelf; and if it be averred, that they were for himſelf and his own wearing, yet it muſt be averred that they were neceſſary and convenient for him to wear, according to his Eſtate and Degree. And therefore where Executor brought an *Aſſumpſit* againſt *C.* for that the Defendant in Conſideration would buy and pay for the Defendant theſe Wares, (*viz.*) Twenty four yards of Lace, Eleven yards of Velvet, Three yards of Broad-Cloth, and would make a Cloak for him; promiſed not only to pay him ſuch Sums as he ſhould expend for the ſaid Wares, but would pay to him as much as he deſerved for making the ſaid Cloak; and alledgeth *in facto*, that he bought the ſaid Wares, and laid out for them 21 *l.* and that he made the ſaid Cloak, and deſerved for it 6 *s.* And alſo he declares, That the Defendant was indebted to the ſaid Teſtator in 27 *l.* for a Doublet and a pair of Hoſe of Velvet made for him, and delivered by the Teſtator; and that he promiſed payment, and had not paid it. The Defendant pleads,

That

That at the time of theſe ſeveral Promiſes he was within age. The Plaintiff demurs; and it was adjudged for the Defendant, becauſe it was not averred that they were for his own wearing, and that they were convenient and neceſſary. *Vide* more of this *infra*, tit. *Pleadings*.

It was ſaid *per Coke*, (*arguendo* in *Stone* and *Withypole*'s Caſe, 1 *Leon.* 113. upon the Book of 19 *Ed.* 4.2. in Debt againſt Infant in neceſſary Contract) the Plaintiff ought to Declare ſpecially, ſo as the whole certainty may appear: Upon which the Court muſt judge, if the Expences were neceſſary or convenient or not, and alſo upon the reaſonableneſs of the Price, 1 *Leon.* 113. *Stone* and *Withypole*.

But in *Ruſſel* and *Lacy*'s Caſe, 1 *Keb.* 382. the Particulars are needleſs to be ſet forth.

Reciprocal Conſiderations and Promiſes.

As to Conſiderations: It is now ſetled, tho' the Remedy is not reciprocal, yet the Conſideration of the act or promiſe to do ſomething of Infant, ſhall be good.

Action on the Caſe was brought by Infant *per* his Guardian, in conſideration the Defendant did agree to pay 6 *l.* for permiſſion, to have the Plaintiffs Graſs carried off one Acre of Land, and of 6 *l.* Debt owing to him the Defendant promiſed to pay. The Plaintiff was an Infant, and was not bound by his Agreement, yet he had Judgment, *Mod. Rep.* 25. *Smith* and *Bowen*.

And

And *Twiſden* there cited a Caſe to be Adjudged, in Conſideration the Infant would permit the Defendant to enjoy an Houſe, the Defendant promiſed to pay; and it was agreed after Debate, That it was a good Promiſe, and a good Conſideration, albeit the Infant, as to his part may avoid it for the Infancy; and the Promiſe is entire, 2 *Keb.* 581. *Smith* and *Bowen.*

And ſo is *Auſtin* and *Jervis*'s Caſe in *Hob.* 67, 77. If Infant deliver to B. 20 *l.* and in Conſideration of this B. promiſeth to him to make him an Houſe. This is not a good Conſideration, becauſe that tho' the 20 *l.* was delivered with the Hand of the Infant, yet this is unavoidable by him, and to be recovered againſt him in an Action of an Account; and by *Hobart*, the Conſideration was not abſolutely void, *Hob.* 67, 77. *Auſtin* and *Jervis*'s Caſe.

Conſiderations and Promiſes, made for and on the behalf of Infants.

Now let us ſee, what Promiſes and Conſiderations made for Infants, are good; it being, as it were, a conſequence of the former Reſolution.

The Plaintiff comes and demands a Debt of the Executrix for the Apparel of the Teſtator. The Executrix ſaid to him, *Forbear till* Michaelmaſs *and I will pay you, or put you in ſufficient Security for the payment of it.* And declared further, That at *Michaelmas* ſhe did not pay or put in Security. The Defendant pleads Infancy in the Teſtator at the time of the Contract for the ſaid Apparel. And it was adjudged for the Defendant;

dant; for the Contract was void, and the Infant may plead in Action brought againſt him *Non debet*, 1 *Leon* 113. *Stone* and *Withypole*. Pleading:

This Caſe is abridged in *Rolls* much to the ſame purpoſe, tho' the Suit was not brought againſt the Executrix.

If Infant take up certain Commodities of a Mercer in *London* at a certain Price; and after, for Non-payment of the Money, he threatens to Sue him, and the Mother of the Infant promiſeth to pay the Money at a certain time, if he will not Sue the Infant. This is no Conſideration to maintain the Action; for that the Infant was not chargable in Law for the Money, 1 *Rol. Abr.* 21. *Latch p.* 21.

But it is ſaid in this Caſe in 1 *Leon.* 114. If Infant be bound in an Obligation with a Surety, and after at his full Age he in Conſideration thereof promiſeth to keep his Surety harmleſs, that upon that Promiſe Action lies; for the Infant cannot plead *Non eſt factum*, 1 *Leon.* 114. *Mich.* 28 & 29 *Eliz. Edmond's* Caſe. *Quære.*

If Infant enter into an Obligation to pay a certain Sum of Money, and after the Obligee brought Debt for the Money, and procures a *Latitat* to arreſt him; and the Obligor being now at full age, and having Coniſance of it, comes to the Obligee, and ſaith to him, *That if he will not arreſt him, he will pay the Money to him.* This is not any Conſideration to maintain the Action, foraſmuch as the Infant might avoid the Obligation by Promiſe by Infant at full age, if Defendant forbear to arreſt him on a Bond given under age, to pay, its not good.

by Plea, 1 *Rol. Abr.* 18. *Monneys* and *Kapy*.

Infants other Acts.

Now as to what other acts of his own an Infant ſhall be bound, or not, take two or three Rules and Reſolutions thereupon:

1. *Regula.* Acts of Neceſſity.

1. Acts which Infant doth out of Neceſſity ſhall bind him: As his Preſentation to a Benefice ſhall be good, otherwiſe Lapſe ſhall incur againſt him.

So if Infant be Executor, upon payment of any Debt due to the Teſtator, he may make an Acquittance, and it ſhall be good; but in that caſe a Releaſe without payment is void.

2. 2. Acts of Compulſion. Regularly, whatſoever an Infant is bound to do by Law, that ſhall bind him, albeit he doth it without Suit in Law, 1 *Inſt.* 172.

3. 3. Its laid down as a Rule in *Siderfin*: Acts of Ideots, Infants and Maſters of Ships ſhall bind them and others in caſe of Neceſſity.

And our Law allows many perſons to make Contracts in caſes of Neceſſity, which of themſelves are void. And ſo tho' Contracts of Infants are generally void, yet in caſes of Neceſſity they ſhall bind them; and this not only *quoad eſſe*, but *quoad neceſſitatem convenientiæ*: As if Infant Contracts for ſo much to inſtruct him in Writing and Reading, *Sid.* 112. *Scot* and *Manby*.

And

And for this Reaſon, if Infant is Houſe-keeper, and buys Neceſſaries for his Houſehold, it ſhall bind him, as was Adjudged in *Hill* and *Blackſton*'s Caſe, *Trin.* 15 *Jac. Rot.* 1374. But not for his Trade. *Vide ſupra.*

Infant buys Neceſſaries for his Houſhold; it ſhall bind him.

If an Infant ſells Goods for Money, and doth not deliver them, but the Vendee takes them; he is a Treſpaſſor, and the Action lies againſt him, 1 *Leon.* 114.

Vendee of the Goods of an Infant, a Treſpaſſor.

Infant's Right regularly is bound by Sale in open Market: But Sale in Market-overt by an Infant of ſuch tenderneſs of Age, as that it may appear to the Buyer that he is within Age, bindeth not, 2 *Inſt.* 713.

Bound by Sale in open Market, and how.

Where Infant makes a Treſpaſs, and ſubmits to Arbitrament, it ſhall bind him at his full Age; becauſe he is chargable for Treſpaſs, and ſhall pay Damages, *Latch.* 21.

Of Infants ſubmitting to Arbitrament.

The Father and his Daughter on the one part, and *K.* on the other part, ſubmit themſelves to Arbitrators of all Quarrels, the Daughter being within Age, the Father is bound to *K.* that he and his Daughter ſhall perform the Award on their parts, and *K.* is bound to the Daughter to perform the Award on his part. They award, That *K.* ſhall pay to the Daughter ſo much, and that the Father and Daughter ſhall Releaſe. *K.* doth not pay the Money at the day; and the Daughter brought Debt on the Bond, (for *K.* is bound to the Daughter only.) It was moved (in this Caſe) That if the Submiſſion be void, the Arbitrament is void; and if the Arbitrament is void, the Bond doth not bind *K.* becauſe an Obligation to perform

perform a void Award, is void: And ſo far the Court agreed.

It was Argued, That the Submiſſion of the Infant is void: But *per Cur.* it is good, becauſe it is for her benefit; otherwiſe Infant ſhall be in worſe caſe than one at full Age. It is true, if the Infant is bound to the performance of an Award, the Obligation is void; but the Submiſſion is good. Otherwiſe if the Infant may ſhew this to his diſadvantage; but here it appears to be her advantage.

*Per* ſome; The Submiſſion is not void, but voidable by Infant, and his Election to avoid it is referred to him during his Infancy; but if an Infant do an act at his full Age, it ſhall bind him.

*Quære*, if this Award be not ill, becauſe it is to be paid to the Daughter, *Latch. p.*207. *Stone* and *Knight.* 10 *H.*6.14.

CHAP.

## CHAP. XI.

### *Of Acts in Law.*

*Where an Infant ſhall be bound by Collateral Warranty or not, with a good Diverſity; where a Diſcent ſhall toll the Entry of an Infant that Right hath. The Law doth not priviledge Infancy to the prejudice of anothers antient Right. Priviledge of Infancy holds not aguinſt the King. The difference of Baſtard* Eigne & Mulier puiſne *from other Common Caſes. Where Joynt-tenant ſhall take in advantage of the Infancy of his Companion. Diverſity as to the Entry of a Stranger to the uſe of an Infant. Of Remitters of Infants in 2 or 3 Diverſities. The nature of Remitter. Diverſity between a Feoffment at Common Law, and a Feoffment to Uſes. Of Remitter by Entry for Condition broken. Infant bound by Non-performance of Conditions.*

NOw by what Acts in Law an Infant ſhall be bound or not, comes properly to be treated of, having ſhewed you by what Acts or Contracts of his own he is obliged. As to this our firſt enquiry ſhall be, Where an Infant ſhall be bound by Collateral Warranty, diſcended upon him during his Nonage or not.

Where Infant ſhall be bound by Collateral Warranty or not.

As to this a good diverſity is taken, 1 *Inſt.* 380. *a. b.* Where the Entry of the Infant is lawful when the Warranty diſcendeth, and where it is not lawful, 1 *Inſt.* 380.

With a good Diverſity.

Where it is lawful, he may enter upon the Alienee with Warranty, and defeat it, becauſe no Laches ſhall be adjudged in the Heir within Age. But if he bring his Action againſt him, he ſhall be barred by this Warranty, ſo long as the Eſtate whereunto the Warranty is annexed continues, and be not defeated by the entry of the Heir: But if he be within Age at the time of the Alienation with Warranty, and becomes of full Age before the Diſcent of the Warranty, the Warranty ſhall bar him for ever. But if the entry of the Infant is not lawful, when the Warranty diſcendeth, the Warranty doth bind the Infant as well as a Man of full Age; and the Reaſon is, becauſe the Eſtate whereunto the Warranty is annexed continueth, and cannot be avoided but by Action, in which Action the Warranty is a Bar.

A Man ſeiſed of Land had 2 Sons, and deviſeth it to his youngeſt Son in Tail, and dies, the eldeſt having Iſſue a Son, the youngeſt Aliens in Fee with Warranty, and goes beyond Sea and dies without Iſſue, the Son of the eldeſt being within Age; if this Collateral Warranty ſhall bind the Son within Age in Reverſion without Aſſets was the Queſtion. *Per Curiam*, It is clear, this is a Collateral Warranty, and was a bar without Aſſets notwithſtanding his Nonage, becauſe his entry was Tolled. But if the Infant be diſſeiſed, and a Collateral Anceſtor releaſe with Warranty to the Diſſeiſor and dies, and the Infant brings Aſſize againſt the Diſſeiſor; this Collateral Warranty

ranty ſhall bind him, becauſe, tho' he might have entred and defeated the Warranty, yet in as much as he had brought his Action, he had given power to the Diſſeiſor to plead it againſt him; *Moor. p.* 96. *Evan's* Caſe, 25 *H.* 6. 63.

*Where a Diſcent ſhall take away the Entry of an Infant that right hath, or not.*

Regularly, No Laches ſhall be accounted in Infants by Non-entry, or Non-claim to avoid Diſcents. Reg.

For he hath a right which the Law preſerves for him; but *aliter* where he hath not a Right to enter, for there he ſhall be bound; as if a Man is ſeiſed of Lands in Fee, his Wife *privement enſeint* with a Son, and a Stranger abateth and dies ſeiſed, and after the Son is Born, he ſhall be bound by this Diſcent, becauſe at the time of the Diſcent he had no Right to enter.

Law doth not priviledge Infancy to the prejudice of anothers antient rights

And tho' the Law doth Priviledge Infancy, yet it doth it not to prejudice anothers antient Right. As *B.* Tenant in Tail Enfeoffs *A.* in Fee, *A.* hath Iſſue within Age and dies, *B.* abateth and dies ſeiſed, the Iſſue of *A.* being ſtill within Age; this Diſcent ſhall bind the Infant, for the Iſſue in Tail upon his Abatement is remitted, and the Law doth more reſpect an Ancient Right in this Caſe, than the Priviledge of an Infant, who had but a defeaſible Title, 1 *Inſt.* 246.

Piviledge holds not againſt the King.

But if the King dies ſeiſed of Land, and the Land diſcends to his Succeſſor, this ſhall bind the Infant, for the Priviledge of Infancy in this Caſe holds not againſt the King. Now where the Infant hath Right of Entry, if a Diſcent be caſt, the Infant being within Age, he may Enter at any time, either within Age or after his full Age, 1 *Inſt.* 248. *a.*

The difference of *Baſtard Eigne* and *Mulier puiſne* from other Common Caſes.

But the Caſe of *Baſtard eigne* and *Mulier puiſne* differ from the Common Caſes of Diſcent and Bar. For Diſcents do only toll the Entry of him that Right hath, but leaveth him to his Action; but now if a Man ſeiſed of Lands in Fee hath Iſſue two Sons, *Baſtard Eigne* and *Mulier puiſne*, and the Father dies, the Baſtard Enters claiming as Heir to his Father, and occupieth the Land all his Life, without any Entry made upon him by the *Mulier*, and the Baſtard hath Iſſue and dies ſeiſed, and the Land Diſcends to his Iſſue who entreth, in this Caſe the the *Mulier* is barred for ever, both of his Entry and of his Action; and if the *Mulier* be within Age at the time of the dying ſeiſed, he ſhall be ſo barred too; for the Iſſue of the Baſtard is become in Judgment of Law as lawful Heir. For its the Antient Law, *juſtum non eſt aliquem poſt mortem facere Baſtardum qui toto tempore vitæ ſuæ pro legitimo habebatur.* As for this Reaſon, *ſi penes Authorem*; the beſt of it is, theſe Caſes come but rarely, or elſe I conceive Infants *Muliers* Legitimate ought to be relieved by an Act of Parliament. But enough of

of this, and this *in terrorem fornicandi*, 8 *Rep. Lechford's* Caſe.

Two Joyn-tenants, one within Age, the other of full Age are diſſeiſed, and a Diſcent is caſt, and he of full Age dies; the Entry of the other ſhall be Congeable into the whole, 1 *Inſt.* 36.

In Caſe of two Joyntenants being ſeiſed, and one is under Age, and he of full Age dies.

If two Joynt-tenants in Fee, the one within Age, and the other of full Age be diſſeiſed, and the Diſſeiſor dies ſeiſed, and his Iſſue Enter, one of the Joynt tenants being then within Age, and after that he cometh to his full Age, and the Heir of the Diſſeiſor lets the Tenements to the Joynt-tenants for the Term of their two Lives, this is a Remitter as to one moiety to him that was within Age, becauſe his Entry was Congeable; but the other Joynt-tenant hath only an Eſtate for Term of his Life, becauſe his Entry was taken away. For the Advantage is given to the Infant in this Caſe, more in reſpect of his perſon than of his Right, whereof his Companion ſhall take no Advantage.

Where Joyntenant ſhall take no advantage of his Infant Companion.

As to the Entry of an Eſtranger to the uſe of an Infant, the difference is fine. If an Infant make a Feoffment in Fee, an Eſtranger of his own head cannot Enter to the uſe of the Infant, for the Eſtate is voidable, and the Infant at full Age may make it good. But where an Infant is diſſeiſed, an Entry by a Stranger of his own head is good, and preſently veſteth the Eſtate in the Infant, 1 *Inſt.* 245. *a.*

Diverſity as to the Entry of a Stranger to the uſe of an Infant.

But where a Diſcent ſhall toll the Entry of an Infant and where not, *Vide* more fully in 1 *Inſt.* in the Chapter of Diſcents.

Remitters of Infants.

As to the Remitter of Infants (which is an act of Law) the Learning in our Books is very curious, and the delicacy of Reaſon is diſplaied in its full Luſter.

I ſhall give you a Taſt of it.

Regula.

Its a Rule, That if Tenant in Tail diſſeiſeth his Diſcontinuee, his Iſſue ſhall be remitted notwithſtanding the Infancy, or Coverture of the Diſcontinuee, and this ſtands upon the ſame Reaſon as the other of Diſcent, the Law reſpecteth an Antient Right more than the Priviledge of Infancy 1 *Inſt.* 384.

The nature of a Remitter.

Now Remitter is wrought by operation of Law, upon an Eſtate paſt or veſted; the conſequence is, That it muſt be guided by the Eſtate, and waits thereupon. And therefore, Diſcontinuee after the Death of Tenant in Tail makes a Feoffment by Deed to the Iſſue in Tail being within Age, who hath Right, and to a Stranger in Fee, and makes Livery to the Infant in the name of both; the Iſſue in this Caſe is not remitted to the whole but to the Moiety, for firſt he taketh the Fee-ſimple, and after the Remitter is wrought by Operation in Law, and therefore can Remit him but to a Moiety, 1 *Inſt.* 350. *a.*

Diverſity between a Feoffment at Common Law, and a Feoffment to Uſes.

Another diverſity is between a Feoffment at Common Law, and a Feoffment to Uſes. For if Tenant in Tail Infeoffs his Iſſue within Age, he is remitted, and the Law reſpects

ſpects the time of the Feoffment; and not the time of the death of the Tenant in Tail, when ſuch Heir was of full Age. But if Tenant in Tail make a Feoffment in Fee, (his Heir within Age) to the uſe of his Iſſue being within Age, and his Heirs, and dies, and the Right of the Eſtate Tail diſcends to his Iſſue being within Age, yet he is not remitted. Becauſe the Statute executes the Poſſeſſion in ſuch plight, manner and form as the Uſe was limitted, 1 *Inſt.* 348. *b.*

Remitter by Entry for Condition broken.

If Tenant in Tail make a Feoffment in Fee upon Condition and dies, the Iſſue in Tail being within Age doth Enter for the Condition broken, he ſhall be firſt in as Tenant in Fee-ſimple as Heir to his Father, and conſequently and inſtantly he ſhall be remitted; but if the Heir be of full Age he ſhall not be remitted, becauſe he might have had his Formedon againſt the Feoffee, and the Entry for the Condition broken is his own Act. And for the ſame Reaſon, if Tenant in Tail enfeoffs his Heir apparent being of full Age at the time of the Feoffment, and Tenant in Tail dies, this is no Remitter to the Heir, becauſe it was his Folly, being of full Age he would take ſuch Feoffment, &c. and he ſhall during his Life be ſubject to all Charges and Incumbrances made by the Anceſtors; but ſuch Folly ſhall not be judged in the Heir being within Age, in reſpect of his tender years.

Another difference between Infancy and full Age in point of Remitter is in this Case. If Tenant in Tail enfeoffs a Woman in Fee and dieth, and his Iſſue within Age Marrieth the Diſcontinuee, this is a Remitter to him, and the wife hath nothing; and the Freehold and Inheritance of the Wife vaniſhed clear away. *Aliter*, if ſuch Heir were at full Age at the time of the Marriage, for then the Heir hath nothing, but in the Right of the Wife, &c. *Lit.* §. 665.

One ſhall not be remitted by an act which commenceth by his own wrong. Tenant in Tail Diſcontinues and dies, his Son procures others to Diſſeiſe the Diſcontinuee, and to enfeoff him then being within Age, he ſhall not be remitted, becauſe the diſſeiſin is a wrong which commenceth by the Infant himſelf, 2 *And.* 39.

An Infant ſhall be remitted, tho' he take an Eſtate back by Deed intended, or by Fine, 1 *Inſt.* 353.

Where one ſhall not avoid his own Leaſe by Remitter to Infancy.

And note one thing more. If Tenant in Tail Infeoffs his Son within Age, who at full Age lets the Land, and after he is remitted by the death of his Father, yet he ſhall not avoid his own Leaſe, 2 *Rolls Abr.* 422.

Infant bound by Non-performance of Condition.

But Laches ſhall be accounted to an Infant for Non-performance of a Condition, annexed to the Eſtate of the Land, either made to the Anceſtor or to himſelf; and it ſhall bar him of his right to the Land for ever. So of a Condition in Law as one annexed to an Office, *vide ſupra. Plow.* 136. *b.*

An

An Eſtate is Deviſed to an Infant, provided ſhe Marry with the conſent of, *&c.* and ſhe Marries (being under Age) without Conſent; the Condition is broken, and ſhe forfeits the Eſtate, 2 *Keb.* 758. Statute of *Merton* c. 5.

If a Man makes a Feoffment in Fee to another reſerving Rent, and if he pay not the Rent within a Month, that then he ſhall double the Rent, and the Feoffee dieth, his Heir within Age; the Infant payeth not the Rent, he ſhall not by this Laches forfeit any thing; *aliter* of a Feme Covert. And the Reaſon of the Diverſity is, for that the Infant is provided for by the Statute of *Merton* c. 1. *non current uſuræ contra aliquem infra ætatem exiſtent'*. But this Statute doth not extend to a Condition of Re-entry, which an Infant ought to perform, for the forfeiture thereof cannot be called *uſura.* 1 *Inſt.* 246. *b.*

CHAP.

## CHAP. XII.

### *Of Declarations and Pleadings.*

*Perſons ſhall be enabled by Intendment till the contrary be ſhewed. Diverſity where the purview of a Statute is reſtrictive, and where it is general, and after comes a reſtraint. Diverſity between pleading a Feoffment by Common Law, and by Cuſtom. What Averments are needful in Declarations againſt Infants for neceſſaries. If the Bill for neceſſaries, how and what Iſſue ſhall be taken. Who are Judges of neceſſary Apparel. Acknowledment of Satisfaction of parcel, and ſaith not what, ſtops Judgment for any part. Replication ill in the concluſion, yet aided after Verdict by the late Statute. Condition to bring in* A. *and* B. *at their full Ages, how to be expounded. Conſideration of being bound with Security, and ſaith not in what Sum. Infant after* Non-Aſſumpſit *pleaded, moved in Arreſt of Judgment, that he was within Age. If Infant plead* Non eſt factum, *he ſhall not have advantage of his Infancy. What may be given in Evidence on* Non Aſſumpſit. *Where* Non eſt factum *muſt be pleaded, and where the Special Matter, and how to conclude. Where and what Actions the Parol ſhall Demur for* Non-age. *Aſſize. Anceſtral Poſſeſſion. Anceſtral Droiturel. Formedon. Appeal. Partition. Torts. Dower.* Quare Impedit. *Eſtrepement. Debt on Bond. Error. Treſpaſs. Debt againſt the*

*the Heir in Aſſize on being ouſted by Execution on a Statute Merchant, or Recognizance. Where Parol ſhall not Demur for the* Non-Age *of the Husband. Where it ſhall for the* Non-age *of the Wife. Detinue againſt Executor. Diverſity as to the Parol demurring in caſe of Purchaſe, or Diſcent. Counterplea of Age. Where the Parol ſhall Demur againſt all for the* Non-age *of one. Where the Court* Ex Officio *ſhall grant the Age, altho' the party do not pray it.*

HAving in the precedent Chapter ſhewed by what Acts of his own, and by what Acts in Law an Infant ſhall be bound or not, and what Actions, and for what things lies againſt him; it will now be proper to Illuſtrate the ſame by ſeveral Caſes and Reſolutions concerning the manner of Declaring and Pleading.

It is a known Rule, That perſons ſhall be enabled by Intendment *i. e.* perſons ſhall be ſuppoſed of ability except the contrary appear, as if Obligation be made by a Man or Woman, in Action brought upon the Bond he ſhall not be compelled to ſay, That the Man was of full Age, or that the Woman was Sole, for that ſhall be intended till the contrary be ſhewed. But if one will plead a Feoffment, or Grant of *Ceſty que uſe*, there he ought to ſay he was of full Age, *ſane memorie, &c.* on the Statute of 1 *R.* 3. tho' on the Statute of 4 *H.* 7. of Fine and Non-claim he need not do ſo. And the Reaſon is this, The purview of the Act of 1 *R.* 3. is,

Perſon ſhall be enabled by Intendment.

Diverſity where the purview is reſtrictive, and where it is at firſt general, and after comes a reſtraint.

is, That all Feoffments, Grants, &c. being made by any perſon being of full Age of ſame memory, &c. to any perſon, ſhall be good and effectual, and the Act doth not warrant any Feoffment or Grant, but of thoſe perſons who are void of ſuch defects. And therefore, he who will take advantage by ſuch Conveyances, ought to ſhew that he who made them was void of ſuch defects; but otherwiſe it is where the purview is general, and the reſtraint to ſome comes after by exception, as it is in the Statute of 4 *H.* 7. of Fines, or by another branch as it is by the Statute of Wills, where the Deviſee ſhall plead the Deviſe generally, tho' there is a breach after that purview, That Wills made by Infants, Feme Coverts, &c. ſhall not be effectual, *Plow.* 176. *Stowell and Zouch.*

Diverſity between pleading a Feoffment by Common Law and by Cuſtom.

If a Man plead a Feoffment at Common Law it ſhall be good, and if the Feoffor was within Age, it ſhall be ſhewed of the other ſide; but if a Man pleads a Feoffment by Cuſtom, and the other ſaith the Feoffor was within Age; and the Plaintiff replies, That an Infant within Age may make a Feoffment, the ſame is not good, but a departure, for he ought to have ſhewed, that at the beginning of his Declaration. So,

37 *H.* 5. 6. In a *Præcipe quod reddat*, the Tenant pleads, That the Land was Deviſed to him, &c. The Plaintiff replies, That the Deviſor was an Infant. The Defendant ſaith, that by the Cuſtom an Infant at ſuch an Age may Deviſe.

But

But in a *dum fuit infra ætatem*, If the Tenant do plead a Releaſe of the Demandant, it is no Plea without ſaying that he was of full Age; for the Plea ſhall be taken moſt ſtrong againſt himſelf, that is, that it was made when he was within Age, *Pl. Com.* 104. *a.*

Seeing perſonal Actions brought againſt Infants are for neceſſaries, or things relating thereunto, I ſhall be a little more large about the Declarations, and *giſt* of the Action and Pleadings thereupon.

What averments are needful in Declaration againſt Infants for neceſſaries.

It muſt appear by the Pleadings, That the Apparel (for which the Infant made the Contract) was for the Infant himſelf, and if it be averred that they were for himſelf, for his own wearing, yet it muſt be averred that they were neceſſary, and convenient for him to wear, according to his Eſtate and Degree, as it was adjudged in *Ive and Cheſter's* Caſe. *Vide* the Caſe *ſupra* in the Chapter of Contracts; for the Plaintiff made no ſuch Averment in his Declaration, and therefore it was adjudged for the Defendant. *Ive and Cheſter.*

But *per Cur.* in *Ruſſel and Leay's* Caſe, 1 *Keb.* 382. the particulars of the materialls are needleſs to be ſet forth; but tho' it be not laid expreſly to be for him or his wearing; yet if there be that which is *Tantamount*, and it appears by the Declaration to be ſo, its good enough, as in *Ruſſel and Ley's* Caſe, 1 *Keb.* 182.

Debt was brought on a Bill given for Security of Money due for neceſſaries; The Defendant pleads Non-age. The Plaintiff replies,

plies, it was *pro neceſſario apparatu & veſtitu*, not ſaying it was for him, or that it was ſuitable to his Degree. The Defendant Demurs; but it being ſaid he ſold it to him, it ſhall be intended for him. And if the Bill be unreaſonable then Iſſue may be taken, that it was not due for neceſſaries, and then the Plaintiff muſt ſhew the Bill to be ſuitable to the price of the things, and the whole Bill is void, if the price be unreaſonable. And here by the Demurrer, the Defendant hath confeſſ't it to be due, 2. It was laid to be for neceſſaries *eidem deliberat'*, and does not ſay it was *pro neceſſariis* of the Infant as was *Ives* Caſe, 2 *Cro.* 560. Yet the Court agreed it to be well enough without it, as *Pop.* 151. And *per Cur.* if the Bill be of exceſſive rate, the Defendant may Traverſe, *abſq; hoc* that it was for neceſſary apparel, and the Plaintiff muſt reply ſpecially; alſo the Jury ought to find in ſuch Caſe *non eſt factum*, 21 *Ed.* 4. *Quær.* 1 *Keb.* 382,416,423. *Ruſſel and Ley.*

If the Bill be unreaſonable, then Iſſue ſhall be taken.

Debt was brought upon divers Contracts, all for Apparel, ſome for Fuſtian Suits, ſome for Velvet and Sattin laced, Suits laced with Gold Lace amounting to 44 *l.* whereof he was ſatisfied 4 *l.* The Defendant pleads Infancy. The Plaintiff replies, That he was one of the Gent. of the Chamber to the Earl of *Eſſex*, and ſo it was for his neceſſary Apparel: And it was thereupon demurred. And *per Cur.* we are to judge what is neceſſary Apparel, and ſuch Suits of Satin, &c. are not neceſſary for an Infant tho' he be a Gentle-

Who are Judges of neceſſary Apparel.

Gentleman. It was prayed for the Plaintiff, that he might have Judgment for thoſe that were neceſſary Apparel. But *per Cur.* In regard he had acknowledged ſatisfaction for 4 *l.* parcel, and they did not know wherefore it was paid, therefore he could not have Judgment for any part, *aliter* he ſhould have had Judgment for the Contracts which were allowed of, *Cr. El.* 583. *Makarel and Bachelor.*

Note, In Ejectment Infancy was pleaded, and upon Examination he was found to be 63 years of age, and an Attachment was granted, 2 *Bulſtr.* 67.

In *Aſſumpſit* for Wares ſold. The Defendant pleads, That at the time, &c. he was within age. The Plaintiff replies, The Wares ſold were neceſſary and ſuitable to his Eſtate and Degree. *Et hoc petit qd' inquiratur per patriam. Et præd' Def. ſimiliter* It was moved, that here was not any Iſſue joyned, becauſe there is not any Negative. *Per Cur.* He ought to have averred by *paratus eſt, &c.* and then the Defendant might have denied it. But theſe are two Affirmatives, and it is matter *dehors* the Declaration; but yet in this Caſe the concluſion *al pais* is good after a Verdict, for the matter which is the giſt of the Action is void after Verdict for the Plaintiff, the right of the cauſe being tried, *Sid.* 341. *Burton and Chapam.*

Concluſion ill in the replication, yet aided after Verdict by the new Statute

Bond with Condition, That the Obligor ſhould bring in the Son and Daughter of *J. S.* at their full age, to give ſuch Releaſe as a third perſon ſhall require. The Defendant pleads,

Condition to bring in *A.* and *B.* at their Age. how to be expounded.

pleads, That the Son is alive under age at *D.* The Plaintiff may Demur, for it muſt be taken of their reſpective ages, 1 *Vent.*58. *Roſvill's* Caſe.

Action on the Caſe was brought againſt an Infant, becauſe he put Cloth to the Plaintiff being a Taylor to make a Suit of it, and promiſed to give him ſo much for the making of it, and providing all things neceſſary (as Trimmings) as he deſerved. The Defendant ſaith, true it is, ſuch a promiſe he made, but that then he was within the Government of *A.* and he made this promiſe for him, *abſq*; *hoc* that he made any ſuch promiſe. *Per Cur.* The Action lies, tho' a Bond in ſuch Caſe is not good, and the Plea is Repugnant. In this Caſe there needs not any Averment, that the apparel was convenient for the Infant for his Quality, becauſe he doth not provide the materials, only the making and the neceſſaries to it, as Linings, *Lach. p.* 156. *Delamere and Clare.*

Bond taken *pro ſecuritate* of 10l. for Meat and Drink of an Infant.

Debt was brought on a Bond of 20*l.* The Condition whereof was, Whereas the Plaintiff had paid 10 *l.* for the meat, drink and apparel of the Defendant, if the Defendant ſhould repay the 10 *l.* the Bond to be void. The Defendant pleads Non-age. The Plaintiff replies, The Bond was made *pro ſecuritate* of the 10 *l.* for the meat, drink and apparel of the Defendant. The Defendant Demurs, and Judgment was given for the Defendant, tho' this Caſe is differently reported by *Cro. Eliz.* 920. which is of a Bond taken for double the Sum for the Meat,

Meat, Drink and Apparel of the Defendant, and there adjudged void, *More* 679. *Ayliff and Archdale*, *Cro. Eliz.* 920.

Plaintiff, Infant, brought an *Aſſumpſit* againſt *J.* and declared, That the Plaintiff bought of the Defendant an Horſe for 22 pieces of Gold paid in hand, and for 11 *l.* more to be paid at the Death, or Marriage of the ſaid Plaintiff, for which he ſhould become bound with ſufficient Surety by their Writing Obligatory, the Defendant in conſideration thereof promiſes to deliver the Horſe to him when he ſhould be required; now the Court held the Conſideration good. But Verdict was for the Plaintiff, but Judgment was againſt him for a fault in the Declaration, becauſe he did not aver that the Bond was ready Sealed, and to deliver the ſame to the Defendant, neither did ſet down the Sum in which they ſhould be bound for the ſame. For the Law requires he ſhould be bound in a competent Sum, which is under the Judgment of the Court, and it muſt be pleaded therefore expreſly, that the Court may Judge of it, *Hob.* 67. 77. *Auſtin and Jervis*, *Roll. Abr.* 19. *Meſme* Caſe.

Conſideration Infant ſhould be bound with Security for 11 *l.* for an Horſe, Defendant promiſed to deliver, &c. good conſideration, but defect in the Declaration.

The Defendant pleads *Non Aſſumpſit* in Action on the Caſe, and then afterwards he moved in Arreſt of Judgment, that he was an Infant at the time of the promiſe, & *Quer' nil capiat per Billiam. Vide opin' de Kulings*, 1 *Brownl*, 11 *Auſtin and Jervis's* Caſe.

Infant after *Non Aſſumpſit* pleaded, moved in Arreſt of Judgment that he was within age.

It is agreed in *Fleming* and *Pitman*'s Case, *Winch.*63. If Infant plead *Non eſt factum*, he ſhall not have advantage of his Infancy, *Winch. p.*64.

Where *Non eſt factum* may be pleaded, and where one muſt ſhew the Special Matter.

Its a Rule laid down in our Books: In every Caſe where the Obligation is void, he ſhall conclude *Non eſt factum*, as in the caſe of a *Feme Covert*, ſhe ſhall plead *Non eſt factum*; for it is void as to her.

So where a Deed is razed, &c. But it is otherwiſe where the Deed is only voidable; for there in pleading he ſhall ſhew the Special Matter, and conclude Judgment *ſi actio.*

As if an Infant plead, That at the time of making the Bond he was within age, he ſhall not conclude *Iſſint non eſt factum*, but Judgment *ſi actio*, 1 *H.*7.18. 5 *Rep.*119.

So is 1 *Ventr.*102. Infancy muſt be pleaded, and the party cannot be aided on *Non eſt factum*, 1 *Ventr.* 102. *May*, 2 *Keb.*851. *Paſſue* and *Bore*, *Mar.* 3 *Keb.*798. *Tapper*'s Caſe.

What may be given in Evidence on *Non aſſumpſit.*

*Feme Covert* within age may be given in Evidence on *Non aſſumpſit* pleaded, *per Holt*, and not denyed.

But to plead Non-age at the time of the Converſion in Trover, *Quære.*

*Where*

*Where the Parol ſhall demur for the Non-age.*

Real Actions being changed into Ejectments, and few brought in our times, except in ſome Special Caſes, there need not much be ſaid about the Plea tarrying till the full age of the Infant; yet becauſe it bears a conſiderable Title in our ancient Books, I ſhall obſerve ſome adjudged Caſes, with the Reaſons of the Reſolution, having an Eye to the Real Actions moſt uſual, and no other.

The Reaſon given in *Dyer* 137. why Infant ſhall have his age, is, becauſe he cannot diſcern his own Right; and the Court (*ex officio*) ought to ſpeak for an Infant. Age is to be allowed the Infant when he is to defend his Right.

*Regula.* It is regularly true, That in all Real Actions the Infant ſhall have his age.

And altho' he will not pray it, yet if this appear to the Court they will grant it; but in Tortious Actions made by him he ſhall not have his age, for *malitia ſupplet ætatem*, 2 *Roll. Rep.* 17.

*Except in ſome certain Caſes hereafter mentioned.*

In Real Actions of his own Poſſeſſion.

In all Real Actions which Infant brings of his own Poſſeſſion, altho' he had the Lands by diſcent, and altho' the Tenant plead the Deed or Warranty of his Anceſtor, the Parol ſhall not demur for his Non-age: For by preſumption of Law, the granting that the Parol ſhall demur is for the benefit and in favour of the Infant; becauſe for want of good intelligence of his Eſtate, and of the verity of the Matter, he ſhall not be prejudiced of his Right.

As the Parol ſhall not demur in a Writ of *Entry ſur diſſeiſin* made to the Infant himſelf, nor in a Writ of *Right* of a Deforcement to the Infant himſelf; ſo in a Writ of *Eſcheat*, *Ceſſavit*, Writ of *Right ſur Diſclaimer* brought by Infant, or in a Writ of *Meſne*.

Where the Tenant may plead, that the Parol ſhall demur.

But in Actions *Auncеſtrel Droiturel*, when nothing diſcend but a naked Right from the Anceſtor in Fee-ſimple, who once was in poſſeſſion, to an Infant, there the Tenant without Plea pleaded may pray that the Parol ſhall demur; as in a Writ of *Right*, as Heir to the Anceſtor.

So it Infant bring a *Formedon* in Reverter, as Heir to the Donor.

But in *Formedon* in Remainder, tho' he demand a Fee-ſimple, yet his Anceſtor never was in Seiſin, nor took the *Eſplees*; there the Tenant without Plea ſhall not pray, that the Parol ſhall demur.

In all Actions *Auncestrel possessory*; as in *Cosinage, Ayel, Besayel, &c.* where the Ancestor dies seised, there the Tenant without Plea pleaded may not pray, that the Parol shall demur for the Non-age of the Demandant.

In *Formedon in Discender*, where the Demandant does not recover a meer Right, but a limited Estate *per formam doni*, the Parol shall not demur: But in *Assize* and *Assize* of *Mortdancestor*, the Parol upon any Plea pleaded shall not demur. *Formedon.*

*Formedon in Remainder* was brought against Infant in C. B. The Infant by his Guardian pleads he was in by Discent, and prays that the Parol may demur; and upon this, Issue is taken and found for the Tenant in the *Formedon*, and Judgment final was there given, (*viz.*) That the Demandant shall be barred. And for this a Writ of *Error* brought in B. R. and Judgment was affirmed. The Reason is, because this Issue is upon a Matter in Fact, which is supposed to be in the Conisance of the party; and if he will give so much Trouble and Charge to the other party, its reason he should be barred. *Aliter* upon Demurrer, because the party is not supposed to be Conisant of the Law. And it is a Rule in all Dilatories, or other Matters pleaded in Abatement, if Issue be taken its peremptory, and the Prayer is, *Quod breve cassetur*, *Sid.* 252. 1 *Keb.* 869. *Ampcot*'s Case. *Regula.*

In all Real Actions at Common Law, (and in some few its taken away by Statutes) if the Tenant was within age, and in by Discent, he shall have his age: As in *Scire fac'* upon a Fine; in Error, if he be Tenant; in *Formedon in Discender*, in *Ayel*, unless it be founded in his own Tort.

*Vide pluis de hoc in* 6 *Rep. Markal's* Case.

The first Statute about Age is *Westm.* 1. *c.*47. which ousts the Heir of the Disseisor from having his Age.

The second is the Statute of *Glouceſter*, *c.*2. which ousts the Heir of his age in a Writ of *Ayel* and *Besayel*.

The third is *W.* 2. *c.*44. in a *Cui in vita*, 3 *Bulstr.*137,138.

*Regula.* And its a sure Rule, The Parol shall not demur for the prejudice of the Infant; but for his benefit, 2 *Inst.*291.

Appeal. The Parol shall not demur in an Appeal, 2 *Inst.*32.

Partition. The Infant shall not have his age in a Writ of *Partition*, brought upon the Statute, becaus nothing is in demand but the Partition, *Hob.*179.

Diversity. And the Diversity is taken between those things that concern the Hereditary Right, (for which the Parol shall demur) and those Actions which are brought and grounded *de son Tort demesne*; as Waste, Disseisin, &c. for there *Malitosa supplet ætatem*, *Cro. Jac.* 467.

In

In a Writ of *Dower* the Parol ſhall not demur for the favour of Dower; and perhaps the Wife may dye before his age, *Trin. 4 Jac. B. R. Epp's* Caſe. Dower.

In *Quare Impedit* the Parol ſhall not demur for the Nonage of the Patron, Defendant; for the Laple may incur before his full age. *Qu. Impedit*

In a Writ of *Eſtrepment* againſt Infant, he ſhall not have his age, becauſe this Action is in Nature of a Treſpaſs, and this is made by himſelf, 3 *H.* 6. 16. *Eſtrepment*

And for the ſame Reaſon in Aſſize the Tenant ſhall not have his age. *Aſſize.*

If a man by Bond bind himſelf and his Heirs to pay 100 *l.* at ſuch a day; and if he pay it not at the day, that then he and his Heirs ſhall pay 10 *l.* for every Quarter that is behind. Obligor dies, and leaves Aſſets in Fee-ſimple, his Heir within Age, he ſhall have his Age by the Common Law, and after his full age he ſhall be freed of the 10 *l. per* the Quarter, by the Statute of *Merton*, c. 5. Debt on Bond. Stat. *Mert.* c. 5.

Infant Imparles till another Term, where he appears by his Guardian, yet he ſhall have the benefit of his age, 21 *Ed.* 4. 78. After Imparlance.

In a Writ of *Error* againſt the Heir of the Recoveror, by Real Action the Parol ſhall demur for his Non-age, altho' he had nothing in the Land; but the other is Tenant, becauſe he is preſumed not to have Coniſance of his own Right, or to know what is beſt for himſelf, 9 *H.* 6. 46. Error.

In Error to reverſe a Fine, the Defendant, if he be Ter-tenant in tail by diſcent, ſhall have his Age. The Defendant to a Writ of *Error* pleads a diſcent of Lands to him within age, and prayed his age; and the age was granted, becauſe he that prayed it was Ter-tenant: But if he had not been Ter-tenant, he ſhould not have his age in Error, *Mo.* 847.

If *Baron* and *Feme* levy a Fine of the Land of the Husband, and after the Husband dies, and the Coniſee dies, his Heir within age, againſt whom the Wife brings a Writ of *Error*, being Ter-tenant; but the Wife pleads, ſhe claims only Dower in the Land, yet the Plea ſhall demur, becauſe the Wife may make other Title in the Land when it is reverſed. And the Dower is not demanded in this Action, as in a *Quod ei deforceat*; tho' there was ſome doubt upon the Demurrer, *H.* 13 *Jac. B. R. Herbert* and *Bincot.*

Dower.

In Treſpaſs *Vi & armis* againſt an Infant, who Juſtifies for Rent and the like, as Heir to his Father; if the other ſhew forth the Deed of the Anceſtor in diſcharge, yet the Plea ſhall not demur; but he ought to anſwer to the Deed preſently.

Treſpaſs, and juſtifies for Rent.

In a Writ of *Debt* againſt the Heir he ſhall have his age, becauſe he may at his full age diſcharge himſelf by ſaying, that he had nothing by diſcent, *H.* 7 *Jac. Vivian* and *Trelawny.*

Debt againſt the Heir.

If

If a man ſue Execution upon a Statute Merchant againſt an Heir within age, and ouſts him by it, an Aſſize lies for the Heir; for he ſhall have his age.

*Aſſize* being ouſted by Execution on Statute Merchant.

So if a man ſue Execution upon a Recognizance againſt an Heir within age, he ſhall have his age altho' he be partly charged as Ter-tenant, 3 *Rep. Sir William Herbert's* Caſe.

So of a Recognizance.

The Infant who had the Tenancy by diſcent, ſhall have his age in a *Per quæ ſervitia* brought againſt him, 9 *Rep.* 85. *Coney's* Caſe.

In Action brought by *Baron* and *Feme*, for the Inheritance of the Wife, the Parol ſhall not demur for the Non-age of the Husband, becauſe it is in right of his Wife, *Dyer* 137. But,

Wherere Parol ſhall not demur for the Nonage of the Huſband, and where it ſhall for the Non-age of the Wife.

In a *Præcipe quod reddat* againſt *Baron* and *Feme* of the Land of the Wife had by diſcent, the Parol ſhall demur for the Non-age of the Wife, altho' the Husband be of full age.

In Action of *Debt* brought againſt *Baron* and *Feme* upon the Bond of the Anceſtor of the *Feme*, the Parol ſhall demur for the Non-age of the Wife.

In Detinue againſt Executor, upon Bailment to the Teſtator, the Parol ſhall not demur for the Non-age of the Executor, 11 *H.* 6. 40.

Detinne againſt Executor.

If the Infant be in by Purchaſe, he ſhall not have his age.

*Regula.*

As

Purchaſe. As if Leaſe for life be, the Remainder to the right Heir of *J. S.* who dies, his Heir within age; he ſhall not have his age.

So if a Gift is made to the Father for life, the Remainder in tail to the Son, the Remainder to the right Heirs of the Father; and after the Father dies and the Fee diſcends to the Son within age, yet he ſhall not have his age, becauſe he hath the Eſtate tail by purchaſe, 7 *H.* 4. 5.

If Leſſee for life ſurrender to an Infant, who had the Reverſion by diſcent, he ſhall not have his age.

Heir of the Diſſeiſee ſhall have his age. If the Infant be in by Abatement, and not by Diſcent, he ſhall not have his age; but if the Heir of the Diſſeiſee enter, he ſhall have his age, 9 *H.* 4. 5.

Diſcent. If Tenant in Tail enfeoffs his Iſſue and dies, the Iſſue ſhall have his age; for he is remitted, and ſo in by diſcent.

If an Infant be enabled by the Cuſtom to ſell his Land at a time certain, as (ſuppoſe) at the age of Fifteen, after this time and before his full age of One and twenty years he ſhall have his full age; for the Cuſtom doth not extend to this Collateral thing, 11 *H.* 4. 36.

What ſhall be a good Counter-plea. If a man ſaith in an Action in which Age lies, That his Anceſtor was ſeiſed in Fee, and died ſeiſed, and this diſcended to him within age, and pray his age; it is a good Plea that his Anceſtor died not ſeiſed, 29 *Ed.* 3. 6.

One ſeiſed in Fee-ſimple, makes a Feoffment in Fee to one and Heirs; afterwards he levies a Fine to him and his Heirs, the Coniſee dies,

dies, and this diſcends to his Heir within age. The Heir of the Coniſor brings a Writ of *Error* againſt the Heir of the Coniſee, to reverſe the Fine, who prays allowance of his age. The other Counterpleads, and ſaith againſt this, *You ought not to have your Age, becauſe you have a Feoffment made by my Father, to your Father and his Heirs.* This Plea ſhall not ouſt him of his age.

*Where the Parol ſhall demur againſt all, for the Non-age of one.*

If two are vouched, if the Plea demur for the Non-age of the one, it ſhall demur for the other alſo.

So if one Coparcener had aid of the other within age, if the Plea demur for the Non-age of the one, it ſhall demur for both, 9 *H.*6.47. 1 *Inſt.*164.*a.*

In *Dum fuit infra ætatem* by two Coparceners of the Seiſin of their for the Non-age of one of the Demandants all the Plea ſhall demur, *Dyer* 137.

If Four enter into Recognizance, and after one dies, his Heir within age; in a *Scire fac'* againſt the Heir and the others, the Parol ſhall demur againſt all, 29 *Aſſ.*37.

The Parol ſhall demur for the Non-age of one Co-heir upon the Obligation of their Anceſtor, *Mo. p.*74.

*Where*

*Where the Court* ex officio *ſhall grant the Age altho' the party do not pray it.*

Note, If the Parol ought to demur for the Non-age of the Infant; altho' that the Tenant would anſwer, yet the Court ought to award that the Parol ſhall demur, 6 *Rep.* 5. *a. Marſhal's* Caſe.

CHAP.

## CHAP. XIII.

### *Of Infant Executors and Administrators.*

*Of the Power of Infant Executor. A Releaſe of an Executor for Principal Money and Intereſt,* Quære, *if a* Devaſtavit. *The Releaſe of Infant-Executor ſhall not bar him, and why. In what Caſes it will bar. Of the Infants Agreement to a Deviſe. Infant-Executor may Sue by Attorney; but not defend without a Guardian, and why. Executors, ſome under Seventeen, and others above; all may joyn in one Suit, and they may Sue by Attorney. Of Adminiſtration* durante minori ætate. *It is General or Special. This ſort of Adminiſtration is not within the Statute of* 21 H. 8. *Where and when, and for what Reaſon, Adminiſtration* durante minori ætate *ceaſeth. The Office and Power of an Adminiſtrator* durante minori ætate, *and what acts done by him ſhall be good and binding, or not. How ſuch Adminiſtrator may grant Leaſes: Or ſuch Adminiſtratrix gives Bond to Creditors, and then takes Husband, the Husband may retain the Value. Of Actions and Suits brought by and againſt an Adminiſtrator during Minority, with Declarations and Pleadings. Adminiſtrator, during the Minority of an Executor of an Executor, how he ſhall be named Adminiſtrator during the Minority of an Infant-Executor; both muſt be*

*be named in Action brought. If Administrator* durante minori ætate *be Plaintiff, the Non-age of the Executor must be averred:* Alitèr *where he is Defendant, and why. Averment that the Executor is under the Age of* 21 *years, vitiates the Declaration. Trover by Administrator during Minority.* Scire facias *by Executors at full Age, on Recovery by Administrator during Minority. Promise to pay by Administrator during Minority, on forbearance of Suit, if the Executor were above* 17 *at the time of the Promise, its no good Consideration. Prohibition on Agreement pleaded in Account to the Ecclesiastical Court. In Debt such Administrator pleads Judgment against him by a Stranger, and the Infant was then above* 17 *years; yet the Bar is good, and the Judgment not void. Pleads, That such a Day the Minor came to* 17, *and after that he refused. How the Law is after the Executor comes to* 17 *years, in reference to the Administrator* durante minori ætate. *How such Administrator shall be charged, and the Pleadings thereon. One is in Execution at the Suit of the Administrator* durante minori ætate, *and then the Executor comes of full Age, how he shall be relieved.* Scire facias *by Executor at full Age, upon Recovery by Administrator during Minority. Administration* durante minori ætate *is repealed and granted to another, who calls him to account; yet the Executor may call him to account again.*

*And first, of the Power of Infant Executor, or Administrator.*

INfant Executor takes the Principal Money forfeited upon a Bond, and gives a Releaſe; it was argued, whether the Releaſe was good, becauſe Intereſt properly is not due at Common Law, and there is no Conſcience he ſhould have the Forfeiture. But it was agreed that this Releaſe ſhall not bar him; for the entire Sum is due to the Executor: But if he takes all the Money, and makes a Releaſe, it is good; and if the Defendant will have remedy, he muſt go into a Court of Equity; but he cannot plead this Releaſe in bar at Common Law. But it was agreed by two of the Judges, That ſuch Releaſe by Executor at full age, upon receipt of the Principal Money and Intereſt, ſhall be only Aſſets for the Intereſt and Principal ſo received, and ſhall not be a *Devaſtavit* for the reſidue, becauſe he did that in good Conſcience, which he ought to do, *Cro. Car.* 490. *Kniveton* and *Lathar.*

Releaſe by Infant Executor, for Principal Mony and Intereſt. Qu. of a *Devaſtavit.*

But *Rolls* is more poſitive in the Report of the Caſe, 1 *Abr.* 730. If *A.* be bound to *B.* in 100 *l.* for the payment of 52 *l.* at the end of Half a year, and after *B.* dies, making three Executors; and after the Obligation is forfeit, one of the Executors comes to 18 years of Age, and then accepts the 52 *l.* in full ſatisfaction of the Obligation, and makes a Releaſe of the ſaid Obligation, yet this doth not releaſe the Obligation; for

for that the Releaſe is made by an Infant; and by the Forfeiture of the 100 *l.* it was a debt of the Inteſtate, and the 52 *l.* may not be in ſatisfaction of the 100 *l.* and in Equity there may be good cauſe to take the Forfeiture; and in an Action of *Debt* againſt Executor, he may plead a Judgment upon an Obligation forfeit in Bar, *Ultra quæ* he had not Aſſets, which ſhews that the Sum forfeited is the Debt, and Infant Executor may not releaſe the Debt of the Teſtator without ſatisfaction.

The reaſon why the releaſe of Infant-Executor ſhall not bar him.

Now the Reaſons why the Releaſe of an Infant-Executor ſhall not Bar him are two:

1. Becauſe if it ſhould bar him, it ſhould be a *Devaſtavit*, and charge him of his own proper Goods.

2. It would be a *Tort*, which the Infant may not do by his Releaſe; but all things elſe which he doth, according to the Office and Duty of an Executor, ſhall bind him; and therefore he may give a Diſcharge for ſo much as he receives.

In what caſes it will bar him.

And the Book of 16 *H.* 6. *Releaſe* 45. is to be underſtood, when the Infant receives full ſatisfaction; ſo that for his Releaſe there muſt be a true Conſideration.

But if one indebted to the Teſtator by ſingle Bill, if Infant-Executor receive the Money and make an Acquittance, the Acquittance is good, *quia eſt de neceſſitate*, otherwiſe the Obligee is not bound to pay the ſame, 1 *And.* 177.

It was ſaid to be adjudged in the Caſe of one *Manning*, That where Infant-Executor ſold the Goods of his Teſtator for a leſſer price than they were worth; and afterwards brought Action of *Detinue* againſt the Vendee *in retardatione executionis Teſtamenti*, That the Sale was good, and ſhould bind the Executor, notwithſtanding his Non-age, 4 *Leon.* p. 210. *Vide infra.*

The Agreement of an Infant-Executor, That the Deviſee ſhall take the thing deviſed to him by Will, is not good, *5 Rep.* 29. *b.* The Infants agreement to a Deviſe.

Its ſaid in 3 *Leon.* 143. in one *Manning*'s Caſe, to be adjudged, That where Infant-Executor ſold the Goods of his Teſtator at an Undervalue, and afterward brought an Action of *Detinue* againſt the Vendee upon it *in retardatione executionis Teſtamenti*, That this Sale of the Infant-Executor was good, and ſhall bind him. *Sed quære.* 3 *Leon.* p. 143.

If Infant-Adminiſtrator, being above 17 years of age, by aſſent of his Friends ſells a Leaſe for years, which he had of Land as Adminiſtrator to another, to the intent to pay the Debts of the Inteſtate, and to diſcharge Debts which were for the Infant himſelf, Apparel or Dyet; this ſhall bind the Infant.

It hath been much queſtioned, whether Infant-Executor ſhall Sue by Attorney? But it was Reſolved in *Foxwiſt* and *Tremain*'s Caſe, That Infant-Executor, after 17 years of Age, may Sue by Attorney; but not de- Infant Executor may ſue by Attorney, but not defend without a Guardian, and why.

ſend without a Guardian, *Sid.* 449. *Foxwiſt* and *Tremain.*

(So it was adjudged in *Cro. Jac.* 441. *Cotton* and *Weſtcot.*)

For in ſuch caſe the Executor, Plaintiff, cannot draw any Loſs upon himſelf. But *Twiſden contra*, That he cannot Sue by Attorney, becauſe firſt, he cannot make a Letter of Attorney; this ſeems to be a good Law Reaſon: And by him it hath been adjudged, That he ought to Sue by Guardian, 1 *Ventr.* 54.

His ſecond Reaſon was, He may be injured by the Attorney's Plea, and cannot remedy himſelf, as he may do againſt his Guardian.

As if in Debt the Defendant pleads a Releaſe, and the Attorney confeſſeth it; and if the Adminiſtrator be above 17, yet he ought to Sue *per Gardianum*: For tho' by the Civil Law he is able to undertake the Adminiſtration, yet the manner of his Suing is to be determined by our Law; and that cannot be by Attorney, till the age of 21, *Mich.* 1649. *Colt* and *Skeward.*

Executors, ſome under 17, and others above, may all joyn in one Suit.

And if one Executor be 17 years of Age, and the other Executor within 17, both may joyn in one Suit. Or if one be of full age, and the other under 17, they may joyn in one Suit, becauſe both are Executors *quoad eſſe*, tho' not *quoad executionem*, 2 *Saund.* 212.

But this Caſe is more fully Reported in *Saunders.* Which is,

Four

Four Infant-Executors bring an Action of the Caſe upon an *Aſſumpſit*; the Defendant pleads in abatement, that two of the Plaintiffs are within the age of 17 years, (*viz.*) of 13 years, and no more. The Plaintiff demurs.

It was Reſolved,

(1) That the Action was well brought in the Name of all: Which the Reſolution in *Hutton* and *Maſcew*'s Caſe ſeems to favour. Which was,

*Scire facias* was brought by one Executor upon a Judgment obtained by the Teſtator. The Defendant pleads in Abatement, That there was another Executor in full Life, not named in the Writ. The Plaintiff replies, this other Executor was within the age of 17 years. And upon Demurrer it was ruled in the *Exchequer-Chamber*, That the Action was well brought by one Executor only, without naming the other, who was within the age of 17 years, *Mich.* 15 *Car.* 2. *B. R. Hutton* and *Maſcew*, 1 *Keb.* 750.

This Caſe of *Hutton* and *Maſcew* is Reported in *Raym. p.* 198. and agreed, That where one makes his Executors, ſome of full age and one within age, that the Action might be brought by all the Executors joyntly, becauſe they make but one perſon as it were, and all repreſent the Teſtator joyntly: Or it may be brought as in *Hutton* and *Maſcew*'s Caſe, the Executors of full age may Sue without the Infant; and adjudged, *quod Def. reſpond' ouſter*, *Raym. p.* 198.

And they may sue by Attorney.

(2) It was Resolved, they may Sue by Attorney, and the Executors of full age may make Attorney for those within age. And *Stat.* 24 *Jac. c.* 13. aids the defect, if Infant, sole Executor, Sue by Attorney; and in the Principal Case, the Plea being in Abatement, a *Respondeas ouster* was awarded. So that these two Points are now settled.

## *The Nature of an Administrator* durante minori ætate.

If one under the age of 17 years be made an Executor, the Ordinary shall grant Administration to another during his Minority; but if the Infant-Executor be 17 years of age, or above, such Administration committed by the Ordinary is void, 5 *Rep. Pigot's* Case.

It is General or Special.

But such Administration is granted either

{ Generally, or Specially.

And that granted Specially runs thus:

The form of a Special Administration *durante minori ætate.*

——ad opus commodum & utilitatem Executoris durante minori etate, & non aliter nec alio modo.

And the Observation of this diversity will be of use, as you may see by some Cases following.

As

As to the Nature of an Adminiſtration *durante minori ætate*, its a Truſt, and ſomething more, as you may ſee *infra tit.* His Office and Power.

This Adminiſtration, during the Minority of an Executor, is not within the Statute of 21 *H.* 8. to be granted of neceſſity to the Widow of the Teſtator, becauſe there is an Executor.

This Adminiſtration *durante minori ætate*, not within the Statute of 21 H. 8.

And ſo this Adminiſtration differs from another Adminiſtration, which the Ordinary is bound to grant upon pain of 10 *l.* to the *Feme*, *Hob.*250. *Briers* and *Goddard*, 1 *Roll.Abr.* 18,21.

### *When and for what Reaſon Adminiſtration* durante minori ætate *ceaſeth.*

This Adminiſtration ſhall continue but to Infants age of 17 years; and if there are three Executors, and one is of full age, no Adminiſtration *durante minori ætate* can be granted; and if four Executors are made under age, and one comes to 17 years, the Adminiſtration *durante minori ætate* is determined. So if Executrix, under 17, takes an Husband of 17, it ceaſeth; and ſo if he be of Full age, for the Husband may adminiſter as Executor.

And the Court *ex officio* ought to take Notice, if the age appear in Pleading, 1 *Leon.*74. 5 *Rep.*29. *Prince*'s Caſe, *Cro. Car.* 240. *Wells*'s Caſe.

*The Office and Power of an Administrator, dur' minori ætate, and what Acts done by him shall be good and binding, or not.*

Generally an Administrator *dur' minori ætate* cannot do any Act to the prejudice of an Infant, but may sell Goods, pay Debts, and do all things as an Executor may. But he cannot sell any of the Goods of the deceased, unless it be for payment of Debts, or *bona peritura*: Also he cannot assent to a Legacy, unless there be assets to pay Debts; but this is to be understood where it is granted Specially, 5 *Rep.* 29. *Prince*'s Case.

How such Administrator may grant Leases.

Now whether Administrator *dur' minori ætate* may grant Leases, and in what Cases he may, and in what not, the third resolution in Sir *Moyl Finches* Case will inform us. When the Administration is not committed Specially, but Generally without any Restraint or Limitation, there the Administrator during *minori ætate* may grant Leases. As a Man having a Lease for 50 years expectant upon a Lease for Life, dies, his Executor being of the Age of 3 years, and after Administration is committed to one during the minority of the Executor, who makes a Lease for 10 years, this Lease is good. But when Administration is committed Specially, he cannot grant such *Interesse termini*, 6 *Rep.* 67. *b. Sir Moyl Finche*'s Case.

Admini-

Administratrix *durante minori ætate* of the Daughter Executrix made divers Obligations to the Creditors of the Testator, and after took Husband. *Per Cur.* So much of the Testators as amounted to the value of the Debts paid and undertaken by the Wife, the Husband may retain them as his own. *Quær.* If the Wife dye, for then the Husband is no longer chargable by her Bond; *Hob.* 250. *Briers and Goddard.*

Administratrix gives Bonds to Creditors and then takes Husband, the Husband may retain the value.

*A.* Enfeoffs *B.* on Condition that if he pay 10*l.* to the Feoffee his Executors, and Assigns within three years next ensuing, that then, &c. Feoffee hath three Sons whom he makes Executors, and dieth before payment; the Ordinary commits Administration to *J. S.* during the minority of the Executors. By *Dyer*, It is the surest way for *A.* to pay the Money to the Executors, and he shall be accountable to them, and if the Money be paid to one of the Executors it is sufficient, 4 *Leon. p.* 100.

Of payment of Mortgage Money to him.

*Of Actions and Suits brought by and against an Administrator during Minority, and Declarations.*

It was the Opinion of some, That Administrator *durante minori ætate*, in our Law cannot sue or be sued, because he is rather a Bayliff to the Infant than an Administrator; but this is a fancy, *Godb.* 30, 104. *Owen* 35.

*The Office and Power of an Administrator*, dur' minori ætate, *and what Acts done by him shall be good and binding, or not.*

Generally an Administrator *dur' minori ætate* cannot do any Act to the prejudice of an Infant, but may sell Goods, pay Debts, and do all things as an Executor may. But he cannot sell any of the Goods of the deceased, unless it be for payment of Debts, or *bona peritura*: Also he cannot assent to a Legacy, unless there be assets to pay Debts; but this is to be understood where it is granted Specially, 5 *Rep.* 29. *Prince*'s Case.

How such Administrator may grant Leases.

Now whether Administrator *dur' minori ætate* may grant Leases, and in what Cases he may, and in what not, the third resolution in Sir *Moyl Finches* Case will inform us. When the Administration is not committed Specially, but Generally without any Restraint or Limitation, there the Administrator during *minori ætate* may grant Leases. As a Man having a Lease for 50 years expectant upon a Lease for Life, dies, his Executor being of the Age of 3 years, and after Administration is committed to one during the minority of the Executor, who makes a Lease for 10 years, this Lease is good. But when Administration is committed Specially, he cannot grant such *Interesse termini*, 6 *Rep.* 67. *b. Sir Moyl Finche*'s Case.

Admini-

Administratrix *durante minori ætate* of the Daughter Executrix made divers Obligations to the Creditors of the Testator, and after took Husband. *Per Cur.* So much of the Testators as amounted to the value of the Debts paid and undertaken by the Wife, the Husband may retain them as his own. *Quær.* If the Wife dye, for then the Husband is no longer chargable by her Bond; *Hob.* 250. *Briers and Goddard.*

Administratrix gives Bonds to Creditors and then takes Husband, the Husband may retain the value.

*A.* Enfeoffs *B.* on Condition that if he pay 10*l.* to the Feoffee his Executors, and Assigns within three years next ensuing, that then, &c. Feoffee hath three Sons whom he makes Executors, and dieth before payment; the Ordinary commits Administration to *J. S.* during the minority of the Executors. By *Dyer*, It is the surest way for *A.* to pay the Money to the Executors, and he shall be accountable to them, and if the Money be paid to one of the Executors it is sufficient, 4 *Leon. p.* 100.

Of payment of Mortgage Money to him.

*Of Actions and Suits brought by and against an Administrator during Minority, and Declarations.*

It was the Opinion of some, That Administrator *durante minori ætate*, in our Law cannot sue or be sued, because he is rather a Bayliff to the Infant than an Administrator; but this is a fancy, *Godb.* 30, 104. *Owen* 35.

Administrator during the Minority of an Executor, how he shall be named.

Administrator during the Minority of an Executor, shall be named Administrator of the Goods of *T. C.* during the Minority of *M.* Executor of the said *T. C.* late Executor of *E. C.* and shall not be named Administrator of the Goods of *E. C.* not Administred by *T. C.* But had the Infant been Defendant, he should have been named but Executor of the Executor, for the rest follows, but the committing Administration is of both, *Heb.* 246. *Morton's* Case.

Administrator during the Minority of an Infant Executor, both must be named in Actions brought.

*B.* made his Wife, and *J.* his Son being one year old Executors, and the Wife only proved the Will; yet she cannot bring an Action without naming the other Executor, and if he be not named the Bill shall abate; and altho' the Mother had Administration during the Minority of the Infant, yet the Infant ought to be named, for they are both Executors, and his being named affirms him to be Executor, 1 *Brownl.* 101. *Smith's* Case, *Yel.* 130. *Mesme* Case *cited* 2 *Sanders* 213.

If Administrator *dur' minori ætate* be Plaintiff, the Non-age of the Executor must be averred, *aliter*, where he is Defendant, and why.

*W.* brought Debt as Administrator *omnium bonorum, &c.* of *A. E.* during the Minority of *J.* Executor of the said *A. E.* Executor of *R. E.* By this Administration he cannot meddle with the Goods of the first Testator, and so the Action lies not, *Linnet and Every.*

If Administrator *durante minori ætate* be Plaintiff, the Non-age of the Executor must be averred, *i. e.* that he is within 17 years of Age, for he is to take Cognizance how long his Authority shall continue, and he ought

ought to ſhew it to enable himſelf to the Action. (*Quær.* If not aided after a Verdict) *Secus* if he be Defendant, for in an Action againſt Adminiſtrator *durante minori ætate* of an Executor, he needs not aver the Executor was ſtill within the Age of 17 years.

1. Becauſe the Plaintiff is a Stranger to the Power given to the Defendant, and he cannot be Coniſant of what Age the Infant is.

2. Becauſe the Defendant (in *Croſt's* Caſe) had joyned Iſſue, by which he admitted that his Power continues. And ſo long as the other continues his medling he ſhall be ſued. And the Plaintiffs are not to take Coniſance of the age of the other, as where Joyntenancy is pleaded on the part of the Plaintiff, the Defendant need not ſhew how; but if he plead it on his own part, he ought to ſhew in particular how; and here if his Authority were determined, it ſhould be ſhewn on the Defendants part, 1 *Rolls Rep.* 400. *Hob.* 251. *Carver and Haſebrig. Yelv.* 128. *Croſts and Walbanck.* 5 *Rep. Pigots*, 2 *Rolls Rep.* 466. *b. Cr. Jac.* 590. *Walthall and Ald.*

Regular in Pleading.

An Action was brought againſt the Defendant as Adminiſtrator during the Minority of *J. S.* and the Plaintiff ſhews in his Count, that the ſaid *J. S.* at the time of the Writ brought, was, and yet is under the age of 21 years, and Verdict *pro Quer.* But Judgment was arreſted, for the Declaration was inſufficient, becauſe the Adminiſtration ceaſeth at ſeventeen; ſo that he may be eighteen, nineteen or twenty years of age, and yet the

Averment, that the Executor is under the age of 21 vitiates the Declaration.

the Administration ceaseth, and so doth the Action against such Administrator according to the Resolution in *Pigot's* Case, 2 *Brownl.* 247, 248. *Brownhead and Spencer.*

Trover by Administrator *dur' minori ætate.*

Administrator *durante minori ætate* may have Action of Trover of the Goods of the Testator, for he had more than the bare custody of them, for he had the property it self, 1 *Roll. Abr.* 911. *Seth and Seth.*

Declaration is during the Minority of 3 and on the profert, &c. it appears to be of four and Verdict *pro Quer. Quære.*

An Action of the Case was brought by one as Administrator during the Minority of three, where it was of four; and the Plaintiff declares as Administrator during the Minority of three, and upon *profert in Curia Literas Administrationis* it appears, that it was committed during the Minority of four, and Issue was taken upon Collateral matter and found for the Plaintiff; and it did not appear, whether he was within the age of seventeen or above. And whether this were good after a Verdict, the Court was divided in *Bennet and Maude's* Case.

*Scire fac'* by Executor at full age on Recovery by Administrator during Minority.

Administration is granted to one Executor during the Minority of another, and he in his own name brings a *Scire fac'* against the Defendant, on Recovery in *Scire fac'* had by the Testator as Executor of *A.* who recovered against him, this is good, and so adjudged for the Plaintiff on Demurrer of the Defendant to the *Scire fac'*. And its agreed in 2 *Leon. p.* 278. *pl.* 36. *Knight's* Case, That if an Administrator during Minority recover, the Executors at full age may have a *Scire fac'* thereupon, *Tr.* 16. *Car.* 2. *B. R. Hutton and Mascue.* 2 *Leon. p.* 278. *Knight's* Case.

Now

Now the Cognizance of this Adminiſtration ceaſing at 17 appears in *Dumport*'s Caſe. Action on *Aſſumpſit* was brought againſt the Adminiſtrator *durante minori ætate* upon a promiſe to pay upon forbearance of Suit, &c. The Defendant pleads, That the Executor was above 17 years of age, at the time of the promiſe made, for that it being then ceaſed, it is no good Conſideration, and ſo adjudged a good bar, 1 *Rolls Abr.* 910. *Cr. Car.* 14. *Car.* 2. *Dumport and Pinſer.*

Promiſe to pay by Adminiſtrator *dur' minori ætate*, on forbearance of Suit, if the Executor were above 17 at the time of the promiſe, its no good conſideration.

*Of Pleading by Adminiſtrator* durante minori ætate, *in Actions brought againſt him, what is good or not.*

It is taken for a Rule in 1 *Roll. Abr.* 910. If Adminiſtration be granted to *A. durante minori ætate* of B. if it appear to the Court in pleading, that B. was of the age of 16 years, the Court *ex Officio* ought to take notice of the Eccleſiaſtical Law, that the Adminiſtration is determined and void, 1 *Rolls Abr.* 910.

Executor of the Infant calls the Adminiſtrator *dur' minori ætate*, to account in the Eccleſiaſtical Court. Prohibition granted on agreement pleaded.

C. is Adminiſtrator *durante minori ætate.* The Infant dies, and makes the Wife of B. Executrix, the Executrix calls C. to account in the *Eccleſiaſtical Court.* C. pleads agreement with the Husband of A. and that he gave 80 *l.* in ſatisfaction of all Accounts, and a Prohibition was granted, *Hetly p.* 18. *Cradland*'s Caſe.

In

In Debt Administrator *dur' minori ætate* pleads Judgment against him by a Stranger, and the Infant was then above 17 years of age, the bar is good, and the Judgment not void. Account with the Infant and Releaſe found on *plene Adminiſtravit* pleaded. Pleads that ſuch a day the *Minor* came to 17, and after he refuſed, &c. Demands Judgment *de brevi*, where ill.

In Action of Debt againſt the Adminiſtrator, if the Defendant pleads a Bar, a Judgment may be had againſt him by an Eſtranger upon an Obligation, and in the Record he is named Adminiſtrator *durante minori atate* of J. S. who was then within the age of 18 or 20 years; this is a good bar of the Action; for though the full age of ſuch Infant Executor is 17, yet if an Action was brought againſt the Adminiſtrator after, and this age of the Infane appears to be paſſed, yet if Judgment be given againſt the Adminiſtrator it is not void, *Tr.* 14. *Cr.* 1. B. R. *Good and Pinſent.*

The Defendant Adminiſtrator *durante minori ætate* pleads *plene Adminiſtravit*; it was found he had paid 1400 *l.* in diſcharge of Debts and Legacies, and had accounted with the Infant Executor when he came of full age, and that upon 91 *l.* paid to the Infant he releaſed all Actions *Quære*, if it is a good Adminiſtration, *Vide Creedland*'s Caſe, *ſupra. Mod. Rep.* 174. *Brooking and Jennings.*

*Scire fac'* was brought upon a Judgment againſt an Adminiſtratrix *durante minori ætate*; ſhe pleads, that ſuch a day the *Minor* came to 17 years of age, and after that ſhe refuſed, and Adminiſtration was granted to another. The Plaintiff Replies, *Quod devaſtavit*, *Hetly* 35. *Margery Rivet*'s Caſe.

In Debt as Executor. The Defendant pleads, That the Teſtator made C. and another Infant Executors, and that after his Death, and before the Action, the Adminiſtration was committed to H. C. during the Minority

rity of the Executors, and that he adminiſtred, and demanded Judgment of the Writ. And the bar was held to be ill, in demanding Judgment of the Writ, 3 *Keb.* 202. *Kellar and Weſtcom.*

In *Anderſons* time, in 1 *Anderſon p.* 34. when the Infant comes to age and proves the Will: The Queſtion was, What remedy he ſhall have againſt the Adminiſtrator for the Goods. *Per Cur.* He cannot have an Action of Account, but *Detinue* for the Goods, or Sue for them in *Court Chriſtian.* 1 *Anderſon* 34.

But Prerogative may ſomewhat alter the Caſe of Pleading, as it was in *Scaccario, Miller and Gore's* Caſe cited in *Godb.* 104. The Infant pleaded in a *Scire fac'* upon Aſſignment of a Bond to the Queen, that S. and E. were Adminiſtrators during his Minority. And *per Cur.* it is no Plea, but he ought to anſwer as Executor. Prerogative.

How

*How the Law is after the Executor comes to 17 years of Age, in reference to the Administrator during his Minority, and how such Administrator shall be charged, and the Pleadings thereon.*

It hath been a great Question in our Books, if the Executor or Administrator *durante minori ætate*, continue the possession of the Goods, after the full Age of the Executor, or Wast them, how he shall be charged, and there are 3 several Opinions.

1. Some held that he may be Sued as Executor *de son Tort*, but this was denied by others; because he comes to the Goods lawfully.

2. Others hold, that he may be Sued as Executor *durante minori ætate* (as a Sheriff may be Sued after the Delivery over of the Prisoners, for Money received on a *Fieri facias* Executed, or for not delivering over his Prisoners that he hath in Execution to the next Sheriff,) because an Estranger cannot know the Age of the rightful Executor; and the only notorious act for discovery of this is, the ceasing of the Administrator *durante minori ætate*, to intermeddle. Of this Opinion was *Hobart* 265. and *Windham* Justice agreed to it, That it was the fittest way to charge him as Administrator *durante minori ætate* continuing, in *Lawson and Croft's* Case.

3. But most held, that he may be charged upon the especial matter discloſed.

The

The Caſe was: Debt was brought againſt the Defendant *durante minori ætate* of the Executor. He pleads, That ſuch a day the Infant came to the Age of 17 years, and that after he did not take Adminiſtration. The Plea, by *Allen*, is not good, for if he did Adminiſter the day the Plaintiff came of age, he ſhall be charged; But how he ſhall be charged was the Queſtion, and how the Creditor ſhall be relieved; for the Goods never came to the new Executors hands, tho' perhaps he may have an Action againſt the former Executor, for ſo much as he did Waſt; and againſt the Vendees he can have no remedy, or elſe the Adminiſtrator may remain Adminiſtrator ſtill for that purpoſe, the Executor being none in effect for thoſe Goods: But the beſt Opinion is, That he ſhall be charged ſpecially. But all agreed, that he muſt plead fully Adminiſtred. And by *Twiſden*, this Plea which here he pleaded, ſhould have been pleaded in Abatement and not after Imparlance, *Sid.* 157. 1 *Keb.* 157, 158. *Lawſon and Croft.*

*Plene Adminiſtravit* pleaded.

Adminiſtration was committed to one during the Minority of the Executor, who waſted the Goods of the Teſtator, and after the Executor attained the age of 17 years, and an Action of Debt was brought againſt the Executor. And the Opinion of the Court was prayed, whether he may plead *unques Executor*, or excuſe himſelf by pleading the Special Matter; but the Court agreed, That it is moſt ſafe to plead the Special Matter, 1 *Brownl.* 80.

The

The Jury found the Adminiſtrator *durante minori ætate*, after the Executors were of full age, had in his hands 4000 *l.* aſſets, to which Adminiſtrator the Executors at their full age did Releaſe all demands. *Per Cur.* This Releaſe is Aſſets in the Hands of the Executors, 4 *Leon. p.* 402. *Kightley's* Caſe.

One is in Execution at the Suit of Adminiſtrator during Minority, and then the Executor come of full age, how he ſhall be relieved.

*A.* Adminiſtrator *durante minori ætate*, brought Debt againſt the Debtor and recovered, and had him in Execution, and now the Infant Executor comes of Age: It hath been a Queſtion, How the party ſhall be diſcharged, in *Godb.* 104. *pl.* 122. for the Authority of the Adminiſtrator is now determined, and he cannot acknowledge ſatisfaction, nor make an acquittance; and the Executor is not party to the Record, and he cannot Sue Execution, yet the Recovery and Judgment ſtand in force. It may be relieved by *Audita Querela*, and in 2 *Brownl.* 83, It was the Opinion of the Court, that the Executor may Sue a Special *Scire fac'* upon the Record, and ſo Sue Execution in his own name, 27 *H.* 7. 8. *a.* And ſo it was reſolved in *Wrights* Caſe, 1 *Rolls Abr.* 888, 889. If Adminiſtrator *durante minori ætate* of an Executor recover in Debt, and after the Executor comes to full age, he ſhall have a *Scire fac'* upon this Recovery, for that he is privy to the Judgment, *M.* 9 *Jac.* B. R. 1 *Rolls Abr.* 888. *Wright's* Caſe.

*Scire fac'* by Executor upon recovery by Adminiſtrator during Minority.

Adminiſtration *durante minori ætate* is Repealed, and another is made Adminiſtrator during Minority, and the ſecond Adminiſtrator

niſtrator draws the firſt Adminiſtrator to Account, and gives him a Releaſe; yet the Infant at his full age may compel the firſt Adminiſtrator to Account again, 1 *Rolls Abr.* 910.

Adminiſtration is committed *durante minori ætate*, Infant comes of full age and proves the Will: Its ſaid, the Infant ſhall not have an Action of Account for the Goods but *Detinue*, or he may Sue in the Court of the Ordinary, *Bendl.* 101. 1 *Anderſon* 34. Account or Detinue.

## CHAP. XIV.

### *Of Deviſes.*

*The Determination at what Age one may make his Teſtament of Goods belongs to the Eccleſiaſtical Law. By our Law Infant at* 18 *years of Age may make his Will of Goods and Chattels. New publication at full Age of a Will made under Age, good. Deviſe of Lands by an Infant to charitable uſes, good. Deviſes to Children unpreferred, how to be conſtrued. Poſſibility. Where a ſecond Husband ſhall have the Eſtate or Profits Deviſed to a Feme, till the Son come to Age. Where there needs no admittance to a Copyhold Eſtate. Legacy to a Woman at* 21 *years, or day of Marriage, and ſhe died before either, the Executor ſhall have it,* aliter *if the Money were Bequeathed to one at the Age of* 21 *years. How the Civil Law is in ſuch Caſes. Diverſity at Common Law, where the Executor of an Infant dying before the time of payment of a Legacy ſhall have it or not. Portions to be paid on Condition of Marriage within* 16, *or without conſent, &c. to be void. Adminiſtrator of a Legatee, who died died before Contingency hapned, had the Money. Maintenance and Education not diſcounted out of a Childs Portion in Equity.*

THE next thing that falls under conſideration is, The Conſtruction of Law upon Deviſes, and Legacies to Children and Infants,

Infants, which is one of the moſt material parts of this Treatiſe. But firſt I ſhall ſhew what Wills, Deviſes and Legacies made, or given by Infant ſhall be good or not.

The Determination at what Age one may make his Teſtament of Goods belongs to the Eccleſiaſtical Law.

In the Caſe of the Chancellor of *Litchfield*, Prohibiton was prayed to the Conſiſtory Court of *Litchfield*, becauſe a Teſtament of of Goods made by one, but of 16 years old being there exhibited, was admitted, and proceedings and Sentence given for the Teſtament, but it was denied; for the Cauſe was proper for the Spiritual Juriſdiction, and the determintion, at what age one may make his Teſtament of his Goods belongs to them. And the Inferior Court having given Sentence againſt their Law, the party may appeal, *Sir Thomas Jones p.* 210.

Infant at 18 years may make a Will of Goods and Chatels. New publication at full Age and of a Will made under Age

But its ſetled in our Law, that an Infant of the age of 18 years may make a Will, and conſtitute Executors for his Goods and Chattels, but he cannot thereby diſpoſe of Lands until the Age of 21 years. Now put the caſe, that an Infant makes his Will of Lands under the Age of 21 years, and dies at full Age without a new publication, this Will is void; but if he make a new publication of it at full age it is good; but then ſuch publication muſt be guided by the Statutes of Frauds and Perjuries, and be ſo qualified as is required by that Statute, or elſe it will not be good in Law. So if a new publication of it be made the ſame day he comes of full age, and which day is the day of his death (as it was in *Herberts* Caſe) it is good; and ſo a Will made the day he comes of

Age, is good, 1 *Inſt.* 89. *b. Sid.* 102. *Herbert* and *Turbal.*

Deviſe of Lands to Charitable Uſes by an Infant.

A Deviſe of Lands, tho' it be void in it ſelf, yet ſhall bind an Infant to Charitable Uſes, as was in *Colliſon*'s Caſe. The Caſe was:

*Colliſon* deviſed an Houſe in *Kent* to *L.* his Wife for life, and after her death made *J. B.* and others Feoffees (as he called them) of the ſaid Houſe, to keep the ſame in Reparation, and to beſtow the reſt of the Profits in the Reparations of the Highways. *Colliſon* and his Wife are dead, and the Land diſcended to an Infant.

This Caſe was in Chancery, between the Pariſhioners and *R.* the Infant, and it was referred to *Hobart* and *Tanfield*; and they Reſolved clearly, that it was within the Relief of the Statute of 43 *Eliz.* for tho' the Deviſe were utterly void, yet it was within the words [*Limited and appointed to Charitable Uſes.*]

*Aliter*, If he were an Infant Lunatick or the like that gave it, or where one appointed that which was not his own, *Hob.* 136. *Colliſon*'s Caſe.

By the Statute of 12 *Car.* 2. *c.* 24. the Father under 21 years may deviſe the Cuſtody and Poſſeſſion of his Child. *Vide ſupra* tit. *Guardian.*

Now

Now as to Deviſes of Lands, and Legacies, and Profits to Children, and at what time the ſame ſhall take effect, and what Conſtructions the Law makes thereupon, the Reſolutions following will give ample direction, for your better underſtanding of Caſes of that or the like nature.

Of a Deviſe to an Infant in *Ventre ſa mere*, *Vide ſupra* at large, *Cap.* 1.

What is a Deviſe of two ſeveral Rents, and not a joynt Rent.

A man deviſeth a Rent-charge of 20 *l. per annum* to his Wife and his Son for their Lives, and for the Life of the longer Liver of them; and that after his Son ſhall attain his age of 13 years, he ſhall have 20 *l. per annum* of this Rent *pro meliori manutenentia ſua*, during the Life of the Wife; this is an entire Deviſe of the 50 *l. per annum* to the Wife, until the Son ſhall attain that age, and after they are two ſeveral Rents, and not a joynt Rent, 2 *Sand.* 283, 284.

Deviſe to Children unpreferred

A man makes his Will thus:

*I Bequeath to my Wife the Leaſe of my Houſe during her Life, and after her Death I Will it ſhall go amongſt my Children unpreferr'd.*

Poſſibility.

It was ſaid by ſome, That here is neither Poſſibility or Remainder in any perſon certain; and therefore they concluded, that the Term was wholly in the Wife. But *per Cur.* in this caſe the Poſſibility ſhall riſe well enough by the Death of the Wife, to the Daughter unpreferr'd.

And ſo it was Reſolved in *Amner* and *Lodington*'s Caſe; That a man poſſeſſed of a Term deviſeth it to *B.* his Wife for life, and after her death to his Children unpreferred, and after *B.* dies, *C.* being then the ſole Daughter of *A.* ſhall have it; for an Executory Deviſe, which had a dependance on the firſt Deviſe, may be made to a perſon uncertain. For it was uncertain, whether the Daughter ſhould have this as long as *B.* lived; or whether ſhe might have been advanced in the Life of *B.* 1 *Roll. Abr.* 612. *Amner* and *Lodington*'s Caſe.

Where a ſecond Husband, ſhall have the Eſtate or Profits to a *Feme* Legatee, till the Son came to age.

Now where a ſecond Husband ſhall have the Eſtate or Profits deviſed to a *Feme* Legatee, or not, we are to obſerve theſe differences:

Deviſe to a *Feme*, and that ſhe ſhall take the Profits until the Son comes of age to maintain and bring him up; her ſecond Husband ſurviving her ſhall not take the Profits; for that nothing is deviſed to the Wife, but a Confidence, which by her death is determined.

Diverſity.

*Aliter*, Had he deviſed the Profits of the Land to the Wife till the age of the Infant, to Educate him, &c. the ſame had amounted to a Deviſe of the Land it ſelf, and ſo a Chattel in the Wife, and conſequently the ſurviving Husband ſhall have it, 2 *Leon.* 221.

So

So is 1 *Browne* 79. One ſeiſed in Fee made his Will thus:

*Item*, I will that my Wife and Executrix ſhall have the Education of my Daughter, with the Portion of Money and Profits of my Land to her own uſe until my Daughters Age of Eighteen years; Provided ſhe ſhall pay the Out-Rent, and keep her Daughter at School.

The Deviſor died; the Wife married one *P.* and performed the Condition, and afterward died; and Judgment was given, that it was a Term, and the Husband ſhall have it.

*Regula.* For if an Intereſt be deviſed, it veſts in the Wife as a Chattel; as was *Dedicot's* Caſe.

Certain Cuſtomary-Lands were ſurrendred into the hands of the Lord, to the intent that the Lord ſhould grant the ſame *de novo* to *Dedicot* for Life, and afterwards to *Jane* his Wife, during the Nonage of the Son and Heir of *Dedicot*. *Dedicot* dyed before any New Grant; afterwards the Lord granted the Land to the Wife during the Non-age of the ſaid Heir, the Remainder to the Heir in Tail, the Heir at that time being of Five years of age; ſo as the ſaid Wife, by force of the ſaid Surrender and Admittance, was to have the Land for 16 years; the Wife took another Husband and died, the Huſband ſhall have the Land during the Nonage of the Infant, and that without any Admittance: For the Wife had the ſaid Eſtate to her own uſe, then the Husband ſur-

Where there needs no admittance to a Copyhold Eſtate.

ſurviving her he ſhall have it; and he comes not in as of any new Eſtate, but as of the Eſtate of his Wife as Aſſignee, 1 *Brownl.* 79. *Balder* and *Blackborn.*

Legacy to a Woman at 21 years or day of Marriage, and ſhe died before either, the Executor ſhall have it.

Where one bequeathed a Sum of Money to a Woman at her age of 21 years, or day of Marriage, to be paid her with Intereſt, and ſhe died before either, the Money ſhall go to the Executor; and ſo it was decreed by my Lord Chancellor *Finch.* But he ſaid, if Money were bequeathed to one at the age of 21 years, if he dies before that age, the Money is loſt. On the other ſide, if the party dye before, it ſhall go to the Executor, 2 *Ventr.* 342. *Cloberry*'s Caſe.

*Aliter*, if the Money were bequeathed to one at the age of 21 years.

How the Civil Law is in ſuch caſes.

It was ſaid in my Lady *Lodge*'s Caſe, by Dr. *Awbrey*, Dr. of Civil Law, that in their Law, If a Legacy be given to an Infant, to be paid when he ſhall come to the age of 21 years, if ſuch a Legatory dye before ſuch age; yet the Executor or Adminiſtrator of ſuch Legatory ſhall Sue for the ſaid Legacy preſently, and ſhall not expect until the time in which, if the Infant had continued in Life he had attained his Full age. But *aliter* in our Law. *Lady Lodge*'s Caſe, 1 *Leon.* 274.

And

And the difference ſtands thus:

If one gives to *J. S.* 20 *l.* when he comes to 21 years of age, or when he ſhall be Married; and he dies before, and makes Executor, his Executor ſhall not have the Legacy. Diverſity, where the Executor of the Infant dying before the time limited for payment of a Legacy, ſhall have it or not.

But if it be thus:

I give to *J. S.* 20 *l.* and I will that it be paid him at the age of 21 years; his Executors ſhall recover the Legacy.

Or if it be:

I give to *J. S.* 20 *l.* toward his Marriage, and he dies before, his Executors ſhall have the Legacy, and may recover it in Court, *Godb.* 182, 383. *Brownl.* 32. 2 *Bulſtr.* 126.

A man deviſeth an Hundred pounds to his youngeſt Daughter, One hundred pounds to his middle Daughter, and One hundred pounds to his eldeſt Daughter, and that all theſe Sums ſhall be levied out of the Profits of his Lands. *Per Cur.* The youngeſt Daughter ſhall be firſt paid, and then the middle, and then the eldeſt, *Conyer's* Caſe cited 3 *Leon.* 155. Portions to be paid to the Children, as they are named in order.

*R.* had two Daughters, and bequeathed by Will to each 20000 *l.* apiece, provided that if either of them married before the age of 16 years; or that the Marriage were without the conſent of ſuch perſons; that then they ſhould loſe 10000 *l.* of their Portion, and that 10000 *l.* ſhould go to his other Children. Lord *Salisbury* married one of the Daughters under the age of 16 years; Portions to be paid on Conditions.

but

but with the Consent of all the parties. It was the Opinion of the Lord Keeper, that both parts must be observed; and she must be of Sixteen years of age, as well as have Consent, *Lord Salisbury*'s Case, 2 *Vent.* 368.

Administrator of a Legatee, who died before the Contingency happened, yet the Mony decreed to him.

A Thousand pound is devised to *J. S.* at One and twenty years of age, and if *J.S.* died under age, then *J.N.* and *J. B.* to have the 1000 *l.* or else the Survivor of them. *J.B.* and *J.N.* dye both in the Life of *J.S.* and before the age of 21 years, and then *J.S.* dies under the age of 21 years; the Administrator of *J.N.* (who survived *J.* B.) sued and obtained a Decree for the Thousand pounds, tho' he died before the Contingency hapned, 2 *Ventr.* 347.

Maintenance and Education not discounted out of a Childs Portion. *Aliter* of Apprentice Money.

One deviseth 250 *l.* to his Son, and makes his Wife Executrix, and she marries another Husband; by Bill in *Chancery* brought by the Son for the Legacy, the Defendants would have discounted Maintenance and Education: Which was not permitted by the Court, so as to diminish the principal Sum; for it was said by the Court, That the Mother ought to maintain the Child; but a Sum of Money paid for Binding him out Apprentice was allowed to be discounted, 2 *Ventr.* 353

*A.* had

*A.* had two Sons B. and C. by ſeveral Venters, and ſeiſed in Fee of *Black-acre* and *White-acre*, deviſeth *Black-acre* to B. in Fee, and *White-acre* to C. in Fee, under this Proviſo following: That if it ſhall ſo pleaſe God either of my ſaid Sons to dye before ſuch time as they ſhall be married, or before they ſhall attain to their age of 21 years, and without Iſſue of their Bodies to be begotten; then I give all the ſaid Lands, which I have by this my Will given to ſuch of my ſaid Sons which ſhall ſo deceaſe before Marriage, or before their age of 21 years, and without Iſſue of their Bodies begotten, unto ſuch of thoſe my ſaid two Sons as ſhall the other ſurvive; any former gift thereof notwithſtanding in this Will to the contrary. And after B. takes Wife, and hath Iſſue a Daughter and dies, and after C. comes to full age and dies without Iſſue before Marriage; in this caſe it is not any Eſtate Tail in B. and C. but a Fee upon the ſaid Contingent of Marriage, or dying before the age of 21 without Iſſue, to come to the Survivor for Life only, *Hill.* 1650. *Hanbery* and *Cocherell.* Fee upon a Contingency.

A Deviſe, That the eldeſt Son ſhall take the Profits till the younger Son be of age, and the Remainder to the younger Son; the eldeſt hath a Fee Conditional, 3 *Leon.* 216. Fee in eldeſt, till the youngeſt come to age.

Or,

Or, as it is Reported in the First Part *Leonard*; One having Issue two Sons, devised that his eldest Son, with his Executors should take the Profits of the Lands, until his youngest Son should come to the age of 22 years, and that then the youngest Son should have the Lands to him and the Heirs of his Body. *Per Cur.* Clearly the eldest Son shall have Fee in the Interim till the youngest Son come to age, 1 *Leon. p.* 101. *Gates* and *Hallywel.*

A Fee, because the Estate Tail is limited to commence upon a subsequent Contingency.

Land was devised to the Son and Heir, and if he dye before his age of One and twenty years, and without Issue of his Body then living, then the Remainder over. He survives One and twenty, and then sells the Land and dies. *Per Cur.* He hath a Fee presently, and so the Sale is good; for the Estate Tail is limited to commence upon a subsequent contingency, *Dyer* 330. *Clacle's* Case, *Cro. Jac.* 675. *Chadwel* and *Cowley*, *Sid.* 148. *Collenson* and *Wright.*

Portionary Legacies, in what Court suable.

One who dwelt in *Somersetshire* made his Will, and by his said Will did bequeath to each of his Children, being Infants, a Legacy of 20 *l.* apiece: The Procurators of the Infants did Libel in the Court of *Arches* against the Executors of the Testator, for the said Legacies, being out of the Diocess, and a Prohibition was awarded. And per *Cur.* the Exception in the Statute of 32 *H.* 8. *c.* 9. doth extend only to Probat of Wills, and that an Averment might be, That the parti-

arties were ſued out of their proper Dioceſs, the ſame doth not appear in the Libel, *Godb.* 214. *pl.* 306.

*A.* ſeiſed of Lands in Fee, and having iſſue two Sons *R.* and *G.* deviſeth, That if his Son *R.* dye before Iſſue, ſo that the Lands deſcend to my Son *G.* then I Will, that my Overſeers ſhall have the Government of my Lands, and of my Son *G.* *R.* took a Wife and died, ſhe being young with Child with a Daughter. Deviſor dies; the Daughter was born. *Per Cur.* The Daughter is excluded from the Inheritance, and *G.* ſhall have the Land. *Sed quære.* 4 *Leon. p.* 32.

*A.* having Nine Children, and poſſeſt of a Leaſe for years, deviſeth it in this manner:

*I deviſe my two Rectories (whereof the Leaſe now) to be divided between my Children, and that all the Profits thereof ſhall remain between my Children, and if my Son* Richard *dye, then the two Daughters of* Richard *ſhall have his part; and if any of the reſt of my Children dye, then his part ſhall come to my Children.*

And after Four of the Nine Children dye, by which an equal part of theſe parts comes to *Richard*, and after *Richard* dies. *Per Cur.* The two Daughters of *Richard* ſhall only have the 9*th* part, which firſt was deviſed to *Richard*, and nothing of the

the four parts, which by the future Dev
comes to *Richard* by the other Four Ch
dren; for the Deviſe to them is only limit
to the firſt part of *Richard*, and the futu
Deviſe upon the death of the other Childr
comes after this Limitation, *Mich.* 10 J
B.R. *Rimer* and *Belcher*.

*Vide infra plus, ſub* tit. *Caſes in* Chancery.

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## CHAP. XV.

### *Of Apprentices.*

*The Nature of the Relation between Maſter and Apprentice. He is not within the Statute of* 5 Eliz. *as to Departure: Nor within the Statute of* 21 H. 8. *How and to what Covenants Apprentices are liable, at Common Law or Cuſtom, and Declarations and Pleadings thereupon. Declaration on Covenants in general againſt Apprentice who pleads* deins age: *Replication by the Cuſtom of* London. *Quære, if it be a Departure. Collateral Covenants ſhall not bind Infants:* Et ſic—— *where a ſufficient Averment. Covenant to Inſtruct, if diſcharged by Death. Account lies not againſt an Apprentice, except for Collateral Receipts. The Statute of* 5 Eliz. *pleaded, That the Father had not* 40 l. per annum. *Retainer. If the intent of a Statute be fulfilled, ſufficient. Declaration ill, for that a Retainer is not averred. Of Obligations with Special Conditions, relating to Apprentices. Proof of waſting and imbezelling Goods, how to be made. Notice, where requiſite. Tho' the Indenture and Retainer according to the Statute be void, yet the Bond to deliver a juſt Account is good. Releaſe to the Apprentice before Forfeiture, ſaves the Bond given by a Third perſon for his Accounting. Bond, not to uſe a Trade, void; but an* Aſſumpſit *is good. Whether the Maſter may ſend his Apprentice*

*Apprentice beyond Sea. Of the Cuſtom of* London *as to Apprentices. Inrolment. The Cuſtom, how tryed. Aſſignee of an Apprentice turned over may have Covenant by Cuſtom. How Apprentice Free of one Trade, may exerciſe another by the Cuſtom of* London. *Explication of the Statute of* 5 Eliz. c. 4. *relating to Apprentices. Indictment for exerciſing a Trade not being Apprentice, how to be laid. In Debt, for uſing a Trade not being Apprentice, how to Declare. Diverſity where a Statute creates an Offence with Qualifications, and where it gives a Penalty to the King. Difference between Action of Debt and Indictment on the Statute of* 5 Eliz. *as to Laying the Action. Of diſcharging an Apprentice, and the Explanation of the Statute of* 5 Eliz. *as to that Clauſe. If the Difference between Maſter and Servant may come before the Seſſions originally, or by way of Appeal only. If Juſtices of Peace may compel one to take an Apprentice. Of Maſters Correcting Apprentices. Remedies for Abuſing, Enticing, &c. Servants. General Damages given, where ill. If Servant dies of a Battery, no Action lies for the Maſter.*

THe Relation betwixt a Maſter and an Apprentice is of general Conſideration, and differs from all other Minors; not only in that the Law favours more the Acts of the Maſter towards his Apprentice, by reaſon of ſuch Relation, but alſo in reſpect of Obligation; eſpecially by the Cuſtom

ſtom of *London*, to which Infants ſhall be bound, which they ſhall not in any other caſe.

One is put Apprentice to a Maſter for Seven years, and the Maſter covenants to inſtruct him in the Trade, and to find him with Meat and Drink during the Seven years, and after dies, having left an Executor. The Apprentice remains Apprentice to the Executor; tho' the Executor cannot inſtruct him in the Trade, yet he is bound to find him Meat and Drink during the Term of Seven years, *Sid.* 216. *Wordſworth* and *Guy*.

He remains Apprentice to the Executor, tho' he cannot inſtruct him.

If the Apprentice misbehave himſelf, the Maſter may correct him, or the Juſtices may puniſh him, *Cro.Car.* 127. *Gilbert*'s Caſe.

It is lawful for the Maſter to maintain his Apprentice with Mony, in an Action brought againſt him, *Moor* 814.

Maſter gives his Apprentice Modey, to defend Actions; its no maintenance.

Apprentice is not within the Penalty of the Statute of 5 *Eliz.* for Departure: And by *Hobart*, It was never the intent of that Statute to make an Infant, who is Apprentice, to be within the danger of it. For an Infant at the age of Fourteen may be bound to be an Apprentice; and the Puniſhment which is given by the ſame Statute is, That ſuch perſon ſhall be Whipt as a Rogue: Which plainly proves the Statute intends thoſe of Full age.

Apprentice not within *Stat.* 5 *El.* as to Departure.

If Apprentice departs with his Maſters Goods delivered to him, he is not within the Statute of 21 *H.* 8. as another Servant is.

Nor within *Stat.* 21 *H.* 8 of departing with Goods.

*How, and to what Covenants Apprentices are liable, and by the Custom of* London; *and of Declarations and Customs thereon.*

Infant cannot bind himself Apprentice by the Common Law; but, by the Custom of *London* he may bind himself Apprentice by Indenture, and it shall be good, 2 *Bulstr.* 192. in *Burton*'s Case.

Declarations on Covenants in general against an Apprentice, and replies by Custom of *London*, is a Departure by the better Opinion.

Covenant was brought against an Apprentice on Indenture. The Defendant pleads, he was within age. The Plaintiff in his Replication maintained his Action by the Custom of *London*, that he may bind himself at the age of Fourteen.

The Question in 4 *Leon. p.* 77. and in *Cro. El.* 652. *Walker* and *Nicholson*'s Case, was, Whether this was a Departure in Pleading? And it was much doubted there, and 19 *R.* 2. cited there, how that an Infant brought an Action against his Guardian in Socage, who pleaded that the Plaintiff was within age. The Plaintiff did maintain his Declaration, That by the Custom of such a place an Infant of Eighteen years of age might bring an Account against his Guardian in Socage, and it was held it was no Departure, *Cro.* 652. 4 *Leon.* 77. *Walker* and *Nicholson.*

In the Principal Case it was much Argued in *Mould, alias Bold*, and *Wallis*'s Case, 14 & 15 *Car.* 2. *B.R.* because he brought his Action as at Common Law, generally, and maintained it by a Custom.

Some

Some argued, That it was a Departure, and cited 1 *Inſt.* 304. and *Kel.* 76. *Abbot of Buckface's* Caſe; which was,

Action was brought againſt *H.* as Bayliff generally. Defendant pleads, he was Receiver. The Plaintiff Replies, That the Tenants of the Manor have uſed to elect a Tenant, which ſhall be Bayliff to collect the Lord's Rents; and this was adjudged a Departure, 1 *Inſt.* 304. *Kel.* 76.

*Yelv.* 13. *pl.* 22. *Wood* and *Hawkshead's* Caſe, it was argued there, If a man Entitle himſelf by the Feoffment of one *A.* and the Defendant ſhews how *A.* was an Infant at the time of the Feoffment, if the Plaintiff in his Replication will induce a Cuſtom to make the Feoffment good, that this is a Departure, the Cuſtom being a matter of Title, and is variant from the Declaration.

They on the other ſide cited 21 *H.* 7. 17. *Feoffment.* The Defendant pleads Non-age. The Plaintiff replies by a Special Cuſtom, That this is not good, *contra* to 37 *H.* 6. 5.

But it was agreed by all, That where one alledgeth a General Cuſtom in a Count, and replies by a Special Cuſtom, that that is not good.

By *Windham* Juſtice: This is no Departure in the Principal Caſe, being no Matter varying from the Count; that being but ſuppoſal and always general, this Special Matter is a good Support, and that this is

Departure in Pleading.

no Departure from the Title, but an anſwer to a Diſability pleaded in Bar, *Yelv.* 13. *VWood* and *Hawshead.*

*Foſter* held it to be no Departure, the gift of the Action being laid in *London*, and the Title is the ſame ſtill, only the perſon enabled, *VVinch.* 63.

But by *Twiſden*; All the Preſidents are to Count on the Cuſtom, as being the ground of the Action; and he was of Opinion, that it is a Departure, as whenſoever the Count is general, and cannot be made good by any particular manner, *VVinch.* 63.

What is a Departure in Pleading.

Count on a Statute that gives a Penalty: The Defendant pleads it was Repealed. The Plaintiff replies and ſets forth, it was confirmed by another Act, this is good. *Contra*, If I count on a Temporary Statute, and the Defendant ſhews it to be expired; the Plaintiff in his Replication ſhews it to be confirmed by a New Statute, is a Departure, as is Reſolved in Dr. *Butler*'s Caſe againſt the *Colledge* of *Phyſicians*, *Lit. Rep.* By all the Judges: So Feoffment generally pleaded may be made good by Leaſe or Releaſe: But in Treſpaſs, if *H.* Juſtifie by a Leaſe from an Abbot for 60 years, he cannot Rejoyn, it is good for 20 years, *Plowd.* 105. by the Act of *Diſſolutions* of 31 *H.* 8.

And further he ſaid, as in *Gilbert* and *Fletcher*'s Caſe, *Hill.* 5 *Car.* 1. the Action is founded on the Covenant, and not on the Cuſtom, and Infant is not bound by collateral Covenant.

But

But the Court gave leave to the Plaintiff, to diſcontinue his Action, and to declare on the Cuſtom of *London*, that an Infant may bind himſelf.

I have been the larger in the recital of this Caſe, becauſe it may give ſome light to other Caſes of the like nature, and which are not yet well ſetled in our Books; I mean as to Departure in Pleading.

Now as to what Covenants an Indenture ſhall bind, or not bind the Infant.

Collateral Covenants ſhall not bind Infant.

Collateral Covenants ſhall not bind Infant. As in Action of Covenant brought againſt the Infant on Covenant to ſerve his Maſter faithfully as an Apprentice in the Myſtery of a Draper, and he lays in the Action, That he defrauded him of his Goods. *Per Cur.* The Statute of 5 *Eliz.* is not ſo ſtrong againſt Infants, as to make Collateral Covenants good. Infant is not bound by thoſe Words at Common Law, and no Collateral Covenant ſhall be maintainable upon that Statute. Action on the Caſe lies upon the Covenant in Law, but not on the Covenant in Fact; and for that he ought to have Collateral Security, and the Retainer is for the benefit of the Infant to learn his Trade; but the Covenant is to his diſadvantage.

Tho' *VVinch* thought the Covenant to be good, being incident to the Retainer. *Per Cur.* There is no remedy but by Action on the Caſe, *VVinch p.* 63. *Fleming* and *Pitman. Vid. Hetl. p.* 63.

*Quære*, How that lies againſt an Infant for Diſceit. *Vide ſupra.*

Covenant was brought upon Indentures of Apprenticeſhip, containing the uſual Covenants in ſuch Indentures, and he ran away with his Maſters Moneys in *London.*

And two Exceptions were taken to the Declaration:

Covenant implied.

1. In the Indenture the words are, That the Infant ſhall be *Loyal and Faithful*, and *ſecreta ſua velare, &c.* without any words of Covenant expreſs.

But it was Reſolved, that the words imply a Covenant.

That Infant ſhall be bound by Covenant, where pleadable.

2. It was Excepted, That Infants ſhall be bound by Covenant, is pleadable no where but in *London.* (The Cuſtom is, That Infant ſhall not wage his Law upon Covenant for Tabling.) *Sed non allocatur*, It is pleadable at any place: This Covenant is allowable at Law, and the Words are, That the *Covenant* ſhall become of ſuch effect and efficacy, as if he had been at full age at the time of his Sealing the Indenture, and then he ſhall be bound in every place within the Realm.

The Court ſeemed to be of Opinion, that it was a good Cuſtom, and the Action was well brought, *Moor* 135. *Stanton*'s Caſe.

In

In an Action of *Covenant* on Apprenticeſhip, the Defendant pleads a By-Law in *London* by the *Common-Council* there, That if any Free-man take to Apprentice the Son of an Alien, the Bond and Covenants ſhall be void.

Cuſtom, By-law, That the Bonds and Covenants ſhall be void, its ill.

And *per Cur.* this is no Plea; for the *Common Council* cannot make the Bonds and Covenants void, but they may inflict a Fine or Puniſhment upon ſuch a Maſter for taking ſuch an Apprentice, *Moor* 411. *Doggerel*, and *Peck.*

Action of *Covenant* was brought by an Apprentice, and aſſigns for Breach, That the Teſtator of the Defendant had Covenanted to inſtruct the Plaintiff in the Art of a Sadler for Seven years, and to find him Meat and Drink during this Term; and that the Defendant after the death of the Teſtator did put the Plaintiff out of his Houſe, and ſo kept him from Meat and Drink.

It was agreed, —*Et ſic*—is a ſufficient Averment of the Breach, and that it is not but Matter of Form. And as for the Law, the Opinion of the Court was, That the Apprentice remains an Apprentice to the Executor; for altho' he cannot inſtruct him, yet he may find him Meat and Drink, &c.

*Et ſic*— Where a ſufficient Averment.

*Per Hide*, This general Covenant to Inſtruct is not gon by his Death, altho' there be no particular Cuſtom, as in *London*, ſpecially ſince the Statute of 5 *Eliz.*

Covenant to inſtruct, if diſcharged by Death.

To which the Court inclined: Tho' ſome were of Opinion, had it been only to Inſtruct, it had been diſcharged by Death; and if it were, yet the Breach is ſufficiently aſſigned if either part be true, as here, in turning him out. Judgment *pro Quer. Sid.* 216. 1 *Keb.* 761, 820. *VVadſworth* and *Eye.*

Account lies not againſt an Apprentice, except for collateral Receipts.

It is generally ſaid, that Action of *Account* lies not againſt an Apprentice, *VVinch.* 11 *Rep.* 89. And it is regularly true with this difference; altho' an Apprentice cannot be charged in this Action, for ordinary Receipts upon his Maſter's Trade, yet upon collateral Receipts, which do not concern the ordinary Trade of his Maſter, he ſhall be charged as well as another. And therefore in the Caſe of *Rivers* and *Pudſey*, in Action of *Account*, the Defendant pleaded, That at the time, &c. and now he is the Plaintiffs Apprentice; and it was held to be no Plea, 3 *Leon.* 63. *Rivers* and *Pudſey*, 11 *Rep.* 89.

*H.* brought Action of Debt againſt *P.* and declared upon Indenture; and that the Defendant covenanted to ſerve him honeſtly and faithfully, as an Apprentice, in the Myſtery of a Draper for Seven years; and that he had defrauded him of his Goods, &c. The Defendant pleaded the Statute of 5 *Eliz.* That none ſhall be an Apprentice to any of the moſt worthy Trades (amongſt which Drapery is one) except his Father have Freehold to the value of 40 *s. per annum*, to be certified to the place in which he is to be Apprentice, by three of the Juſtices of the Peace

5 *Eliz.* pleaded, That the Father had not 40 *l. per annum.*

Peace of the ſame County, and this Certificate to be enrolled in the Town-Book: And he pleaded, That no ſuch Certificate was made, and pleaded the Branch of that Statute, which made every Retainer contrary to the Form of the Statute, void. The Plaintiff replyed, He had 40 *s. per annum*: Defendant rejoyned, He had not 40 *s. per annum*: And the Plaintiff demurs, becauſe the Defendant ſaid in his Rejoynder, that he had not 40 *s. per annum*, and in his Plea he pleaded no ſuch Certificate.

*Per Cur.* The Retainer is good, tho' there is not any ſuch Certificate or Inrolment, if *revera* the Father had 40 *s. per annum*; for the intent of the Statute is fulfilled. Retainer.

As upon the Statute of 21 *H.* 8. *Of Pluralities*, it was adjudged in one *Robin*'s Caſe, That a Diſpenſation is good, tho' it be not Inrolled; and yet there are as ſtrong words of Inrolment as may be. If the intent of a Statute be fulfilled, it is ſufficient.

But the Court agreed clearly, that this is a Departure. But the Doubt was, if the Pleading of the Certificate were good. Departure.

*Hutton* conceived, there ought to be a Certificate to precede the Indenture: But others thought the Bar is good, (*viz.*) the pleading the want of the Certificate, and the pleading that he had 40 *s. per annum* in the Replication is ill; and tho' the Rejoynder of the Defendant is ill, and a departure; yet it appears, that the Plaintiff had not any cauſe of Action; for that the ſaid Statute ſhall not extend to make collateral Covenants good, *Winch.* 63 & 64. *Fleming* and *Pitman*. Certificate

In

Declaration ill, for that a Retainer is not averr'd

In Conſideration of 40 *l.* given by the Plaintiff to the Defendant, the Defendant did aſſume and promiſe to take the Son of the Plaintiff for his Apprentice for Nine years, and to teach, &c. and to find him with Meat and Drink; and doth not ſay, that the Defendant had taken the Plaintiffs Son to be his Apprentice, and ſo no cauſe of Action, 3 *Bulſtr.* 221. he alledgeth no Retainer, 1 *Rol. Rep. meſme Caſe* and *Cro. Jac.* 406. *meſme Caſe*, the Declaration was adjudged not good; for he never avers that he put him Apprentice, or that the other accepted him, 3 *Bulſtr.* 221. *Talker* and *Wright*, *Cro. Jac.* 40. *b. meſme Caſe.*

Obligations relating to Apprentices

Having done with Covenants on Indentures of Apprenticeſhip, I ſhall now conſider of Obligations, with Special Conditions, relating to Apprentices, and the Conſtruction of Law thereupon, with the Pleadings.

And, Firſt, as to Conditions concerning faithful Service; and the Caſes of *Crookhay* and *Woodward*, *Cardinal* and *Hesket*, *Gold* and *Death* are ſetled Caſes.

Proof of imbezelling goods, how to be made.

Condition of a Bond was, That if *J. S.* (the Apprentice) did waſte his Maſters Goods; and this ſhould be proved by Confeſſion under his Hand in Writing, or otherwiſe; and if within three Months after Satisfaction was not made to him, then the Bond to be in force. And the Queſtion was, how this Proof ſhall be? And the difference was, where the Proof is General, there it muſt

muſt be by Jury in the Action brought: Otherwiſe where the Proof is with reference to Time, and before perſons certain, or by Confeſſion; and tho' he did confeſs it, yet it muſt be averred, that he did imbezil, *Cro. El.* 723. *Cardinal* and *Hesket*, *Cro. Jac.* 381. *Hob.* 92. 3 *Bulſtr.* 55. *Gold* and *Death*, 1 *Leon.* 344. *Tedcaſtel* and *Hallywel*, *Cro. Jac.* 488. *Lee* and *Hedge*.

The Condition was, That his Son ſhould render to *C.* his Maſter a juſt Account *de omnibus monetis, bonis, &c.* without imbezeling any way; and that if he did imbezil any, upon due Proof made of it, he woud pay the ſame to him within three Months after demand.

*Per Cur.* Before payment ought to precede account and arrears, and in this Action Proof ought to be made, and he muſt give Notice to the Defendant, 1 *Bulſtr.* 40. *Cockain* and *Goodlage*, *Hob.* 217. *meſme Caſe*, *Crookhay* and *Woodward*.

But this Caſe is more fully and ſenſibly Reported in *Hob.* 217. by the Name of *Crookhay* and *Woodward*.

The Caſe was on Covenant, and declared, That the Defendant by his Deed ſhewed in Court, did covenant to ſatisfie him all ſuch Sums of Money as *J.* his Son, the Plaintiffs Apprentice ſhould imbezil from him within three Months after Requeſt, and then lays the Imbezeling and Requeſt, &c. The Defendant prays *Oyer* of the Deed, which was entred *in hæc verba*; and there the Covenant

nant was to ſatisfie within three Months after Requeſt, and due Proof made of ſuch imbezeling. The Iſſue was, Whether he imbezeled? and it was found *pro Querente*. And Judgment was arreſted, becauſe it appears by the entry of the Deed, that the Plaintiff ought not to have brought this Action until the three Months were incurred, as well after Proof as after Requeſt; whereas the Plaintiff had averred no Proof in the Declaration.

Proof. Requeſt.

And, *per Cur'* the word *Proof* generally laid, ſhall be underſtood Proof Judicial, by *Jury*, *Confeſſion* or *Demurrer* in Court; but if the Form of Proof were by the Writing appointed otherwiſe, that ſhall prevail; as by Witneſſes before two Aldermen, by Certificate, &c. which Proof ſhall be ſet down in the Plea with all the Circumſtances; and then it ſhall be in the diſcretion of the Court, whether that Proof were competent according to the meaning of the Writing: But in this Caſe, becauſe the word [*Proof*] is left at large, and may be made in Court judicially in Action brought againſt the Apprentice, before the Action brought on this Covenant made by another, it may be well taken in this Caſe of a Proof by Trial in Court, and ſo it is every way againſt the Plaintiff, *Hob.* 217. *Crookbay* and *Woodward*, 2 *Roll. Rep.* 40. *Lee* and *Skey*, *Cro. Jac.* 488.

In

In *Cutler* and *Brewſter*'s Caſe the Condition was of Three parts: Breach laid in three parts.

1. If he well ſerved the Plaintiff.
2. If he duly accounted.
3. If he ſhould make ſatisfaction in three Months after Notice.

Breach was, That upon Account he was found 60 *l.* Poliſh-Money in arrears, which he converted to his own uſe, and ſo not well ſerved him, and good; for it was a breach of the firſt part, for every part is ſeveral by it ſelf, *Cro.El.*83. *Cutler* and *Brewſter*.

The Condition of a Bond was, That if Apprentice turned over ſhould waſte the Goods of his Maſter, the Defendant ſhould pay what the Maſter was damnified, and pleads *Nul damage*. The Plaintiff ſets forth a Breach in waſting the Goods, but ſets forth no Notice given to the Defendant; and for that cauſe the Defendant demurred.

But *per Cur.* no Notice is neceſſary, because both parties are of equal Capacity to take notice. Alſo when any one undertakes for a Third perſon, he muſt anſwer for him at his peril, and the Imbezilment is not in the Coniſance of the Plaintiff. Notice, where requiſite.

And *Twiſden* thought, the particulars of the Goods waſted ought to be ſet forth, and not to ſay of ſuch a value, or at leaſt the kind: But afterwards he agreed with the other Judges, That no particulars need to be ſhewed; as in Debt againſt Executors they plead Fully adminiſtred, the Plaintiff may ſuggeſt, they have waſted *diverſa bona* without Where the particulars of the Goods, need to be ſhewed or not.

out ſhewing what; and Judgment *pro Quer'*, *H.* 14 & 15 *Car.* 2. 1 *Keb.* 467, 471. *French* and *Perry.*

The Indenture and Retainer contrary to the Statute, is void; but a Bond to deliver up a juſt Account, is good.

Tho' the Contract or Indenture for retaining an Apprentice according to the Statute is void, yet if ſuch Apprentice give Bond to deliver up a true and juſt account of Merchants Wares, the Bond is good, it being for a collateral Matter; the Bond is good, and out of the Statute, 3 *Bulſtr.* 179. *Bennet* and *field.*

Releaſe to the Apprentice before forfeiture, ſaves a Bond given to a third perſon for his Accounting.

Condition of a Bond entred into by a Stranger, That if ſuch an one did become the Apprentice of the Obligee, and tranſport his Merchandizes beyond Sea, and make Return of them, and make Account to the Obligee, and pay the Money upon Account within a certain time, that then, &c. and afterwards the Obligee releaſed by Deed to the Apprentice, but not to the Obligor, and in Debt upon the Bond the Obligor pleads this Releaſe.

*Per* the Lord *Dyer & tot. Cur.* By the Releaſe to the Apprentice the Obligation is ſaved, if the Releaſe were made before any Forfeiture, or before the Apprentice had broken any Point, according to the Conditions or Covenants: But if it was made after any of them were broken, then ſuch a Releaſe to the Apprentice did not diſpence with the Obligation which was made by the Stranger; becauſe an Obligation once forfeited, cannot be ſaved by any act or Releaſe

*Regula.*

leaſe made or done to a Stranger, 3 *Leon.* p. 45.

As to Bonds for not uſing a Trade, there are ſeveral Caſes in our Books, and upon the whole the Law to that is ſetled, That a Bond that a Tradeſman ſhall not uſe a Trade, is void, tho' it be in ſuch a Town or particular place, and for a time: But an *Aſſumpſit* in ſuch caſe is good, 2 *H.* 5. 5. *March* 191. *pl.* 238. *Barrow* and *Wood*, 77. *pl.* 121. *Cro. El.* 872. *Colgate* and *Batchelor*, *Noy* 98. 2 *Bulſtr.* 136. *Rogers* and *Parry*, 2 *Leon.* 210. *Cro. Jac.* 596. *Broad* and *Jolliff*, 2 *Keb.* 377. *Ferby* and *Arrowſmith.*

Bonds not to uſe a Trade, void; but an *Aſſumpſit* good.

Condition of the Bond was to teach and employ his Apprentice in his Houſe and Service of the Art of Chyrurgery for Eight years: The Maſter ſends him a Voyage to the *Indies*. The Defendant pleaded, he did it for the better Inſtruction of his Servant. The Plaintiff demurs, and Judgment *pro Quer.*

Whether the Maſter may ſend his Apprentice beyond Sea.

*Per Cur.* The Defendant could not ſend his Apprentice out of *England*, except he went with him, (but to any other part of *England* he may,) unleſs the nature of the Trade require it, as a Maſter adventurer, 1 *Bulſtr.* 67. *Coventry* and *Weedale*, 1 *Roll. Abr.* 427. *meſme Caſe* 445. 1 *Brownl.* 97.

The Condition of a Bond was, to pay to his Apprentice, his Executors or Aſſigns Ten Pounds at the time of the end or determination

tion

tion of his Apprenticeſhip. The Apprentice ſerves Six years and then dies.

*Per Cur.* The Obligation is diſcharged, and the Money ſhall not be paid, 1 *Brownl.* 97. *Cheyney* and *Fell.*

## *Of the Cuſtom of* London, *as to Apprentices.*

Inrolment. The Cuſtom of *London*, as to Inrolling of Apprentices, is certified by the Mouth of the Recorder.

And at Fourteen years of age the Apprentice may bind himſelf by the Cuſtom of *London*, as an Apprentice, and it ſhall bind him, tho' he be not Inrolled.

The Apprentice at any time before one year (if his Maſter do not inrol the Indentures) may exhibit a Petition in French to the Lord Mayor and Aldermen, and have a *Scire facias* againſt his Maſter, to ſhew why the Indenture was not inrolled; and if he doth not ſhew a ſufficient cauſe, (as, that he could not bring the Apprentice perſonally, as he muſt, or ſome ſuch cauſe) then he may ſue out his Indenture and be diſcharged of his Maſter, *Palm.* 361, or 31.

But this Caſe is more fully Reported in 2 *Roll. Rep.* 305.

In a Writ of *Error* between the Maſter and the Apprentice, they were at Iſſue upon the Cuſtom of *London*, and the *Certiorari* awarded to the Mayor, and the

the Recorder certified, That where any man, within the age of One and twenty years, and not under the age of Fourteen, binds himſelf by Indenture, in which are many Covenants; theſe ſhall bind the Infant, altho' the Deed was not inrolled before the Chamberlain within the year; but with this difference, That the Apprentice may come in before the Mayor and Aldermen, and there ſhew the Matter by Petition in French, that the Deed is not Inrolled within the year; and upon this a *Scire facias* ſhall iſſue forth to the Maſter, to know why the Deed was not inrolled. And if upon his default the Deed was not inrolled, the Defendant (the Apprentice) may ſue out his Indentures, and ſhall be diſcharged; but if it was not inrolled thro' the default of the Apprentice, as if he would not come to be preſent before the Chamberlain, but abſent himſelf, then he ſhall not be diſcharged; for the Deed may not be inrolled, unleſs the Infant be preſent in Court, 2 *Roll. Rep.* 305.

How the Covenants ſhall bind the Apprentice, tho' not Inrolled.

21 *Jac.* B. R. *Cole* and *Holme*'s Caſe, ſuch Action was brought againſt an Apprentice, (*videlicet*) That he departed from his Maſter's Service, &c. Defendant pleads Nonage; the Plaintiff replyed the Cuſtom of *London*, and that the Indenture was inrolled, as it ought to be; and this was certified by the Recorder to be the Cuſtom; and Judgment was given againſt the Defendant, 21 *Jac.* B. R. *Cole* and *Holmes*.

Cuſtom, how certified, and Trial.

In Action of *Debt* on Bond, whereof the Condition is to perform Covenants in Indenture of Apprenticeſhip in *London*. The Defendant pleads the Cuſtom of *London*, That the Indenture ſhall be void, if it be not inrolled within the year; and this Cuſtom is Traverſed. This ſhall be tryed by the Mayor and Comminalty by the Mouth of the Recorder, *Co. Entr.* tit. *Debt* 144.

Aſſignee of Apprentice Turned-over may have Conant by Cuſtom.

The Cuſtom of *London* is, to Turn-over an Apprentice from one to another; and he to whom ſuch Apprentice is turned over, may have an Action of *Covenant* upon Special Iſſues on the ſeveral Breaches aſſigned; and the Plaintiff in ſuch caſe had a Verdict.

Tho' it was moved in arreſt of Judgment,

1. That *abſtraxit ſe à ſervitio* ſo many Nights, and during that time did not ſerve him; which *per Cur.* being found againſt him is good enough.

2. It is ſaid, He did not ſerve according to his Covenant, whereas no Covenant was made with the Plaintiff, yet it is good enough; and the Concluſion, *& ſic non tenuit conventionem* made with the Plaintiff is as good as can be, and Judgment *pro Quer.* 1 *Keb.* 250. *Bowcher* and *Coſter*.

*Et ſic non tenuit conventionem* pleaded by Aſſignee.

Action

Action of *Covenant* was brought upon the Cuſtom of *London*, That an Infant above 14, and under 21, may bind himſelf Apprentice, and that the Maſter ſhall have *tale remedium*, as if he were One and twenty. Its good, and he need not alledge that the Cuſtom is, that he ſhall have Action of *Covenant* againſt him; for *tale remedium* implies as much, *Mod. Re p.* 271. *Horn* and *Chandler*.

*Tale remedium* implies Remedy by Action of *Covenant*.

In Covenant it was laid, That every Freeman may take an Apprentice, and that Infants may bind themſelves to ſerve.

How the Cuſtom to be pleaded.

It was Objected, That this Cuſtom was alledged in *fieri*, not in *facto*; for Uſage is not added to it as a Cuſtom of a Manor, that every Tenant *potuit & potuiſſet ſurſum reddere* is ill. So *licet & licuit* for the Lord to aſſeſs a Pein.

But the Court *contra*, as *Old Entries* 141. a Cuſtom, that every Citizen and Freeman might deviſe in Mortmain, allowed good. *Vid.* 1 *Cro.* 347. *Raymond*'s Rep. *Windhurſt* and *Gibbs*.

It has been a Queſtion, Whether and in what caſes an Apprentice by the Cuſtom of *London*, being bound and free of one Trade, may exerciſe another; and it is ſerled in *Fletcher* and *Bagſhaw*'s Caſe, 2 *Roll. Abr.* 379.

How Apprentice free of one Trade may exerciſe another by the Cuſtom of *London*

The Caſe was,

Action of Debt *tam pro dom' Rege, quam pro ſeipſo* upon the Statute of 5 *Eliz.* for uſing the Trade of making and heading of Points, not being bound to the Trade as an Apprentice, againſt the Statute.

The Defendant pleads that there is a Cuſtom in *London*, That every Freeman of *London*, being free of any Art or Myſtery, or Occupation, may uſe any other Art, Myſtery or Occupation within the City whereof he is not Free, nor had been Apprentice by the ſpace of Seven years. Upon which Iſſue was joyned, Whether there be ſuch a Cuſtom in *London*.

Now this ought to be tryed by the Mouth of the Recorder, altho' it concern the King as well as a Subject, and alſo altho' this is not like to the Cuſtom of Mortmain, and ſuch ancient Cuſtoms concerning Lands, and the Deviſes of them, which have been uſed to be tryed by the Mouth of the Recorder.

And in *Apletoft* and *Stoughton's* Caſe, P. 11 *Car.* 1. B.R. this was certified by the Mouth of the Recorder *Maſon*, upon a Writ directed to him, and he certified that there was not any ſuch Cuſtom in *London*; for he ſaid by the Cuſtom, He who is free of a Manual Trade cannot uſe any other Manual Trade whereof he is not Free, nor had been Apprentice to it for Seven years; but otherwiſe it is of other Trades that are not Manual

Ar.d

And his Certificate was received by the Court *de bene esse*; but the Court doubted, whether this ought to be tryed by him.

And therefore this Matter was moved in arrest of Judgment, *Trin.* 10 *Car.* B.R. *Rot.* 56. But after divers Arguments it was adjudged, *M.* 14 *Car.* 1. that this was well certified by the Mouth of the Recorder, and Judgment given accordingly for the Plaintiff.

And in *Trin.* 10 *Car.* B. R. *in Informat'* by *Fletcher* against *Bagshaw*, *tam pro dom' Rege quam pro seipso* upon the said Statute of 5 *Eliz.* Issue being joyned, the Recorder *Littleton* certified by his Mouth, that there was not any such Custom, 2 *Rol. Abr.* 579. *Fletcher* and *Bagshaw*.

This Case being a Resolution upon the 5 *Eliz.* I shall go on in the construction and explanation of that Statute, as far as concerns Apprentices, which will be the Subject of the next Section.

Explication of the *Stat.* 5 *Eliz.* relating to Apprentices

Of using a Trade without being Apprentice.

And first of using a Trade, not being an Apprentice.

At Common Law, before this Statute of 5 *Eliz.* it was lawful for any man to use what Trade he could without being Apprentice, 1 *Saund.* 312.

But by the Statute of 5 *Eliz. c.* 4. it is Enacted, That *it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any Art, Mystery, or Manual Occupation, to set up, occupy, use or exercise any Craft, Mystery or Occupation now used or occupied within the Realm of* England *or* Wales,

*except he ſhall have been brought up therein Seven years at the leaſt as an Apprentice in manner and form aforeſaid; nor to ſet any perſon in work on ſuch Myſtery, Art or Occupation, being not a Workman at this Day, except he ſhall have been Apprentice, as aforeſaid, or elſe have ſerved as Apprentice, as is aforeſaid, ſhall or will become a Journy-man or hired by the Year, upon pain that every perſon willingly offending or doing the contrary, ſhall forfeit and loſe for every default* 40 l. *for every Month.*

Infant for exerciſing the Trade of a *Chandler*, not having been Apprentice to the ſame for Seven years; but he was Apprentice to a *Taylor* for Seven years.

*Per Cur.* If one hath been Apprentice for Seven years at any Trade mentioned within the Statute, he may exerciſe any Trade named in the ſaid Statute, altho' he hath not been Apprentice to it, 4 *Leon.*

But now the Charters of the City of *London* may not be any diſpenſation with this Statute, That no perſon ſhall uſe a Trade to which he hath not been Apprentice, altho' they are confirmed by Act of Parliament; and therefore in *Kilderby*'s Caſe, who was Indicted at the Seſſions in *Suffolk*, for uſing the Trade of a *Woollen Draper* in *H.* in the ſaid County for three Months next before the taking of the Indictment, he never having ſerved as an Apprentice to it, againſt the Statute of 5 *Eliz.* c. 4.

Which

Which Indictment being removed into the King's-Bench by *Certiorari*, the Defendant pleads a Special Plea, That he is a Freeman of *London*, and pleads the Charter of 11 *Jan.* 15 *H.* 3. that the Citizens of *London* may *libere & ſine impedimento*, negotiate *de rebus & merchandizis ſuis*, and may reſide where they will in *England* for that purpoſe; and pleads the Confirmation of the ſaid Grant by Act of Parliament, and that he did reſide at *H. præd. cum quibuſdam Mercimoniis Pannariis emen' & venden', &c.* which is the ſame uſing the Trade of a *Draper* ſuppoſed in the Indictment; and Traverſeth, that he uſed the Trade of a Draper for 3 Months mentioned in the Indictment. *Aliter vel alio modo.*

And Judgment was given for the King; for the intent of the Charter is only to give Citizens and Freemen of *London* leave to ſell their Merchandizes and reſide where they will; notwithſtanding ſome Boroughs and Cities claim a liberty to exclude Foreigners, *Dyer* 279. 8 *Rep.* 128.

Traverſe. Indictment for not uſing a Trade, not being Apprentice, how to be laid.

And the Traverſe is ill, *aliter vel alio modo*; for he was not charged by the Indictment with uſing it *aliter vel alio modo.* Alſo the Traverſe goes to the entire time only, where it ought to go to every part of the Time *diſtributivè*; for if he had uſed the Trade by one Month, tho' he had not uſed it for three Months, yet he ought to be Convicted for one Month, and acquitted of the other, if the Traverſe had been rightly taken, 1 *Sand.* 311. *Le Roy* and *Kilderby*, *Sid.* 427. *meſme* Caſe.

Indictment was, That he uſed the Trade of an *Upholſterer* 11 Months, *& amplius*; the *amplius* there is void, *Sid.* 368.

In Debt, for uſing a Trade, not being Apprentice, how to declare.

But in Debt on the Statute of 5 *Eliz.* for uſing a Trade, not having been Apprentice to it, the Plaintiff ought to declare that the Defendant did not uſe it at the time of the Statute, as well as in an Indictment. And Diverſity was taken between a Statute which creates an Offence, which was not ſo before with qualifications as here, and gives Action to the Proſecutor. For in this Caſe no Action lies, without ſhewing that the Defendant is within the Qualifications, and to make it perfectly appear that the Defendant is ſuch an one who had broken this Law, without which he is not liable to this Action: But where a Statute gives a Penalty to the King, he may ſue for it without ſhewing all the Savings; for there it ſhall come on the other part, and its ſufficient for the King to ſay, *contra formam Statuti*, *Siderfin* 303. *Wade's* Caſe.

Diverſity where a Statute creates an offence with Qualifications, and where it gives a Penalty to the King.

Difference between Action of Debt and Indictment on the Statute of 5 *Eliz.* as to Laying the Action.

And there is another Diverſity well to be obſerved, between an Action of *Debt* on this Statute and an Indictment as to the bringing the Action: Debt for uſing a Trade, not being Apprentice to it, lies elſewhere than in the proper County; but Information or Indictment ought to be brought in the proper County. And therefore Action of *Debt* brought for it in the King's Bench is good, notwithſtanding the Statute of 21 *Jac.* 1. which ſaith, That *all Actions, Bills, Pleints, &c.*

*for*

*for Penal Laws there expreſſed, whereof this of* 5 Eliz. *is one, ſhall be commenced and proſecuted in the County where the offence was committed, before the Juſtices of Aſſize,* Niſi prius, Oyer *and* Terminer, *and Juſtices of Peace in the reſpective Counties and Liberties only, and elſewhere*; For it was not the intent of this Statute, to ouſt the Courts above at *VVeſtminſter-Hall* of this Action of Debt, and no Original out of *Chancery* in Debt, was ever made returnable before the Juſtices of Aſſize, *&c. Sid.* 400. *Barnes and Haylers,* 1 *Cro.* 112. 146. *Green and Gadye's* Caſe.

Note, A Man may not be puniſhed in a Leet for uſing a Trade.

## Of the Diſcharging an Apprentice.

It is Enacted by the ſaid Stat. of 5 Eliz. c. 4. *That if any Maſter ſhall miſuſe, or evil intreat his Apprentice, or that the ſaid Apprentice ſhall have juſt cauſe to complain, or the Apprentice do not his duty to the Maſter, Then the ſaid Maſter, or Apprentice being grieved and having cauſe to complain, ſhall repair to one Juſtice of Peace within the ſaid County, or to the Mayor, or other Head Officers of the City, Town Corporate, Market Town, or other place where the ſaid Maſter dwelleth, who ſhall by his wiſdom & diſcretion take ſuch order and direction between the ſaid Maſter and his Apprentice, as the Equity of the ſame ſhall require: And if for want of good conformity in the ſaid Maſter, the ſaid Juſtice of Peace, or other Officer*

Of the diſcharging an Apprentice, and the explication of the Statute of 5 *Eliz.* c. 4. as to that clauſe.

*cer cannot compound and agree the matter, then the ſaid Mayor, or other Head Officer, ſhall take Bond of the ſaid Maſter to appear at the next Seſſions,* &c. *and upon his appearance, and hearing of the matter before the ſaid Juſtices,* &c. *if it be thought meet to diſcharge the ſaid Apprentice of his Appreticehood, That then the ſaid Juſtices, or four of them at the leaſt, whereof one of them to be of the* Quorum, *or the ſaid Mayor,* &c. *ſhall have power in writing under their Hands and Seal to pronunce and declare, that they have diſcharged the ſame Apprentice, and the cauſe thereof, and that the writing ſo being made and inrolled by the Clerk of the Peace, and the Town-Clerk ſhall be a ſufficient diſcharge for the ſaid Apprentice againſt his Maſter. And if default ſhall be found to be in the Apprentice, then the ſaid Juſtices,* &c. *ſhall cauſe ſuch due correction and puniſhment to be miniſtred unto him, as by their Wiſdom and Diſcretion ſhall be though meet.*

The intent of this Act is, That an Apprentice ſhall be diſcharged of an ill Maſter, as the Maſter ſhall be diſcharged of an ill Apprentice, and that clauſe which gives Power to them to miniſter Puniſhment to an ill Apprentice, does not reſtrain, but enlarge the Power of the Magiſtrates further than it gave to them concerning the Maſters; for they may not miniſter Puniſhment to the Maſters for their faults, but only diſcharge their Apprentices; but for the faults of the Apprentices they may inflict Corporal Puniſhment, or Diſcharge them at their diſcretion: But there was a *Quære* in this Caſe,

Caſe, and the Caſe of *VValker and Edwards*, If the Defendant who was ſued in an Action of Covenant, ought to have gone to one Juſtice firſt as the Statute directs, that he might take order in it, and then if he could not agree it, to make his Application to the Seſſions. Another *Quære* was made in *Hawkſworth's Caſe*, If it ought not to appear, That the Order made at Seſſions for diſcharging an Apprentice, ſhould be under the Hands and Seals of the Juſtices there, 1 *Sand.* 315. *Hawkſworth's* Caſe, *Mod. Rep.* 287. *VValker and Edwards.*

*Q.* If the difference between the Maſter and Apprentice may come before the Seſſions originally, or by way of Appeal only.

If the Maſter refuſe to keep the Apprentice any longer, this is a good cauſe of diſcharge, 1 *Sand.* 315.

A Record was removed out of *London*, into the *Kings-Bench* by *Habeas Corpus*, and it was on Debt on a By-Law, that no Freeman ſhould employ any perſon in any Trade which had not been Apprentice to it, or a Freeman of *London*, and that the Defendant had employed one in the Trade of an Upholſter, which had not been an Apprentice to it, and a *Procedendo* was granted, *Sid.* 269. *Player and Petill.*

*Procedendo* or By-Law

*Per VVindham*, Upholſterers were a Corporation in *H.* 7 time. And the Queſtion here is, Whether an Upholſterer be a Trade, and a *Procedendo* ought to go upon 11 *H.* 7. *c.* 19. 1 *Keb.* 930. *Meſme* Caſe.

It hath been a Queſtion, Whether the Juſtices of the Peace may compel one to take an Apprentice; and adjudged by all but *Twiſden*, That they may by the Statute of 5 *Eliz.*

Juſtices of Peace may compel one to take an Apprentice.

5 *Eliz. c.* 4. for they are to be Executioners of the Statute, and that it would be fruitleſs, unleſs they had authority to compel a Man to take an Apprentice. But *Twiſden* ſaid, Then the Son of my Enemy might be put to me, which would be dangerous. But it was ſo ruled in *Giſſer*'s Caſe, 14 *and* 15. *Car.* 2. *B. R. Sid.* 99. *Canterell*'s Caſe.

The Caſe was,

The Churchwardens and Overſeers of a Pariſh in *Darbyſhire*, placed a Child, which was the Baſtard Child of *M. N.* with the Defendant, according to the Statute of 43 *Eliz. c.* 2. and doth appoint the Defendant to receive the ſaid Child. The Defendant appeals to the Seſſions, and there the Juſtices make an Order, that the Defendant ſhall take the ſaid Child as an Apprentice, and the Defendant by *Certiorari* removed the Order into the *Kings-Bench*. Some Exceptions were taken to the Form of the Order.

1. It appears not to be a Poor Child.

2. Nor in what Trade he ſhall be an Apprentice. But *per Cur'* it ſhall come on the other ſide, that ſhe is not a Child within the Statute. And 2*ly*, Husbandry is intended in that Statute, and ſo ſhall be intended in the Order until the contrary appear. But as to the Caſe in Law, the Order was confirmed by three Judges. *VVindham* ſaid, The Judges in Serjeants*Inn* in *Fleet-ſtreet* were divided in the Caſe. Therefore it was agreed, That the Law might come in debate, that an Information ſhould be exhibited againſt the Defendant for not performing thereof.

And

And in *p.* 19. *Car.* 2. *B. R.* The Court was moved to quaſh an Order for impoſing an Apprentice; but the Court refuſed to quaſh it, or to give any Opinon, whether they might impoſe ſo or not, but directed the party grieved by the Order to have an Action on the Caſe if he will. But *Quær.* againſt whom it muſt be brought, *Sid.* 411.

*As to Maſters Correcting of Apprentices.*

If the Apprentice misbehave himſelf, the Maſter may correct him, or the Juſtices may puniſh him. Of Maſters correcting Apprentices

Treſpaſs was brought for Battery. The Defendant juſtified, becauſe the Plaintiff was his Apprentice, and becauſe he neglected his Service, *moderatè caſtigavit.* The Plaintiff Replies, *non moderate caſtigavit*; the Jury found *non moderatè caſtigavit*, and 20 *l.* Damages. It was moved in Arreſt of Judgment, that (*moderate caſtigavit*) is not any anſwer to the Declaration, which doth not import any Beating, and its a *negativum infinitum*, to reply to it *non moderatè caſtigavit*, where it ought to be *de injuria ſua propria. Per Cur.* This were ill upon Demurrer, yet its good after a Verdict by the Statute of *Jeofayls*, *Car.* 2. becauſe here is an Affirmative and a Negative, *Sid.* 444. *Awbry and James.* *Non moderatè caſtigavit*, no good iſſue, yet helped by *Jeofaile.*

Treſpaſs

Treſpaſs of Aſſault, Battery and Wounding. The Defendant traverſeth the Wounding, and on this Iſſue is joyned. *Et quoad verberationem*, he pleads *quod diu ante præd' tempus quo & eodem tempore quo ſupponitur tranſgreſſio præd' fieri*, the Plaintiff was his Servant, and for neglect of his Service *mollit' manus impoſuit, quæ eſt eadem verberatio*; and pleads further, That ſuch a day and year the Plaintiff releaſed to him all Actions, and ſaith not by Deed; yet *per Cur'* the Plea was held to be ill, as being double, 1 *Keb.* 661. *Sid.* 175. *Bleeke and Grove.*

*Remedy for Abuſing or Inticing a Servant.*

One brings an Action on the Caſe againſt another for procuring and inticing his Apprentice from him, (which is before the time expired,) and declares *per quod idem (le Pl.) totum proficuum commodum & eaſiamentum ratione ſervitij ſervientis præd' per totum reſiduum Termini prædicti venitur' recipere potuiſſet totaliter perdidit & amiſit*, to the Plaintiffs Damage of 100 *l.* The Jury find for the Plaintiff, and aſſeſs Damages generally; and Judgment was arreſted, for he ought to recover no more Damages than from the departure, till the time of the Exhibition of the Bill, and not for the future, for he may Return again to his Maſter, and the general Damages being as well for the time to come as the time paſt, it is ill, 2 *Sanders* 169. *Hambleton and Vere*, *Raymod* 200. *Meſme* Caſe.

And

And it ſhall not be intended, that Damages were only given for the loſs for the time paſt, becauſe he hath declared for the time to come, and the Jury have found generally according to his Declaration. General Damages given, where ill.

If one beat the Servant of *J. S.* ſo that he dye of that beating, the Maſter ſhall not have an Action againſt the other for the Battery and loſs of Service; becauſe the Servant dying of the extremity of the Beating, it is now become an offence againſt the Crown, and turned into Felony, and this hath drowned the particular Offence. *Quære*, If after Conviction it doth not lye, as in Caſe of Robbery, *Vide in Stiles* well argued, 1 *Brownl.* 205. *Huggin's* Caſe, 2 *Rolls* 557. *Meſme* Caſe, *Stiles* 347. *Dawke's* Caſe, *Mod. Rep.* If the Servant dye of the Battery, no Action lies for the Maſter.

*H.* was Indicted for practiſe in withdrawing and inticing an Apprentice. After Not guilty pleaded and Verdict, he Demurred to the Indictment on the Preſident in *Cokes Entries* 303. which the Court diſallowed; and *Twiſden* conceived that was ſome *Scire fac'* againſt the party; and Judgment was for the King, 1 *Keb.* 726. *Cok. Ent.* 303. Indictment for inticing away an Apprentice.

Of

*Of the Maſters making the Apprentice Free.*

In *London*, if any Maſter ſhall refuſe to make his Apprentice Free, when the Term in his Indenture is expired, upon Complaint thereof made to the Chamberlain, he will cauſe ſuch a Maſter to be Summoned before him, and if he cannot ſhew good Cauſe to the contrary, will make the Apprentice Free.

In other Corporations, he may have a *Mandamus* to be directed to the Mayor, &c. to make him Free, if the Maſter refuſe to do it. And this was *Townſend*'s Caſe, and the Mayor of *Oxford*, *Raymonds* 69. *Townſend*'s Caſe.

So it was in *Norwich*. And in *Hill.* 15. & 16 *Car.* 2. The Mayor and Commonalty of *Oxford* Retorned to the *Mandamus*, That if any perſon Binds himſelf to be an Apprentice, it is by the courſe of their Corporation to be Inrolled; and *Townſend* Bound himſelf Apprentice to *C.* by which he Covenanted he would not contract Matrimony during his Apprenticeſhip, and that the Indenture was Inrolled, and that he within the firſt two years of his Apprenticeſhip did Marry, and after this he ſerved rather as a Journy-man then an Apprentice.

*Per*

*Per Cur.* Exceptions to this Retorn.

1. Thô he Covenants he will not Marry, yet if he Marry, this is only a breach of his Covenant, but not any Cauſe to bar him of his Freedom.

2. The Retorn, That he ſerved him rather as a Journyman then an Apprentice is uncertain and not poſitive, and Reſtitution was awarded. *Raymond* 92. *Meſme* Caſe.

## CHAP. XVII.

### *Orphans.*

*Of the Court of Orphans in* London. *And the Customs in Relation to Orphans. The Chamberlain of* London, *a sole Corporation to this purpose. Though Security to account, &c. hath been given at Common Law and in the Prerogative Court, yet the Court of Orphans will compel him to give new Security. Hotchpot, the nature of it. Prohibition lies, if any Sue in the Ecclesiastical Court. Orphans not to Marry, or be put out Apprentice without leave of this Court. Marriage without Consent is Finable, and Imprisonment till Payment. Bar is good to common intent. The Custom extends to Lands out of* London. Quær. *If a Freeman discontinue the City and his Trade, how much a Freeman may dispose by Will. The Custom of* London *as to the distribution of the personal Estate. Freeman cannot devise the disposition and custody of the Body of an Infant. Orphans Mony not devisable when payable by the Custom.*

ORphanage being one of the most considerable Customs of *London*, in reference to Infants of Freemen there, deserves next to be considered.

By

By an Act of Parliament, *Rot. pat.* 1 *R.* 2. *no.* 130. It is enacted, That the Mayor and Chamberlain of *London*, for the time being ſhall have the keeping of all the Lands and Goods of ſuch Orphans as happen within the City, ſaving to the King and other Lords, the Rights of ſuch as hold of them out of the ſame Liberty.

The Court of Orphans.

The Court of Orphans is held before the Lord Mayor and Aldermen of the City of *London*, who are Gardians to Children of all Freemen of *London* that are, or ſhall be under the age of 21 years, at the time of their Fathers deceaſe. The Common Serjeant of the City, is the only perſon intruſted by the Court of Aldermen, to take all Inventories and Accounts of Freemens Eſtates.

The youngeſt Attorney in the Lord Mayors Court is always Clerk of the Orphans, and is appointed to take all Securities for Orphans Portions; which Securities are conſtantly taken in the name of the Chamberlain of *London* for the time being. And to this purpoſe, the Chamberlain is a ſole Corporation to him and his Succeſſors for Orphans. And in *Fullwood*'s Caſe, 4 *Rep.* A Recognizance, or Bond made to him and his Succeſſors concerning Orphans, ſhall by the Cuſtom of *London* go to his Succeſſor. And this is not like the Caſe of a Biſhop, Parſon, Vicar, Maſter of an Hoſpital, &c. or ſuch ſole Corporation, for there no Chattel either in Action, or Poſſeſſion ſhall go in Succeſſion.

The Chamberlain of *London* a ſole Corporation to this purpoſe.

But the Executors or Adminiſtrators ſhall have them.

1. Becauſe they cannot take Recognizance, or Bond in their politick Capacity.

2. Neither have they ſuch Cuſtom, 4 *Rep. Fallwood's* Caſe.

But for a Judgment in Law as to the Cuſtom of Orphans, you have a clear caſe reſolved in *Hob.* 474. *Latche's* Caſe.

Cuſtom of *London* as to Orphans.

It was reſolved, There hath been a Court of Orphans time out of mind in *London*, and there hath been a Cuſtom, if any Freeman, or Freewoman dye, leaving Orphans within age unmarried, that they have had the cuſtody of their Bodies and Goods; and that the Executors and Adminiſtrators have uſed, and ought to exhibit true Inventories before them; and if any Debt appears due, to become bound to the Chamberlain to the uſe of the Orphans in a reaſonable Sum, to make true account upon Oath of them after they have been received; and if they refuſe, to commit them till they will become bound. This was adjudged to be a reaſonable Cuſtom, upon the Retorn of a *Habeas Corpus*. The Caſe was, one *Jane* (Widow, Freewoman, and Fiſhmonger of *London*) died, leaving divers Orphans, and one *Latch* was Adminiſtrator, and had exhibited an Inventory of 1000 *l.* Debts unreceived, and was required to give Bond of 2000 *l.* which Sum he refuſed, *per quod*, &c. It was Adjudged good and Reaſonable; and if the Eccleſiaſtical Court will compel them to make Account there againſt this

this Custom a Prohibition lies. And it was alledged for the Prisoner in that Case, That he was already bound in the Prerogative Court to make Account, and so he should be twice bound.

Tho' Security to account hath been given at Common Law, or in the Prerogative Court; yet the Court of Orphans will compel him to give new Security.

And to this purpose was the Case of *Andrews p.17. Jac. B.R.* which was, a Woman before she contracted Marriage with *J. S.* agrees with him, that she shall have power to devise a Sum of 200 *l.* to any person, and after the Marriage she by her Will gives this to the Children of her first Husband, and dies; the Husband after acknowledges a Judgment at Common Law for the Security of it; yet by the Custom of the Orphans of *London*, he may be compelled by the Court of Orphans to give new Security for this to the Chamberlain of *London*.

As for the manner of Process, Summons, Conditions of the Bond for exhibiting an Inventory, the Appraisment, the Security Bond (if the Money be not paid into the Chamber, &c. *Vide Lex Londinensis*, or the City Law.

*Note*, The Custom of *London* is, That if the Father advance any of his Children with any part of his Goods, that that shall bar them to demand any further part, unless the Father under his Hand, or by his last Will did express and declare, that it was but in part of advancement, and then that Child so partly advanced shall put his part in Hotchpot with the Executors and Widow, and have a full third part of the whole,

Hotchpot.

Accounting, that which was formerly given to him as a part thereof; and this is that which the *Civilians* call *Collatio Bonorum*.

Some expound the Cuſtom thus, That as if a Man has two Children and gives to one of them 100 *l.* in part of his advancement, and then dies worth 900 *l.* in this Caſe, the Wife, the Iſſue not advanced, and the Executors ſhall have but three equal parts of the 900 *l.* (*viz.*) 300 *l.* a peice, and then the 100 *l.* ſo given ſhall be in Hotchpot between the Children; which my Lord *Coke* conceives cannot be, for then there ſhall be no equality amongſt the Iſſues, as the Cuſtom doth require, 12 *Rep.* 113.

It was in *Bockford*'s Caſe in *Chancery*, 1 *Jac.* 2. declared the Cuſtom of *London* to be, That Children not fully advanced were to bring in what they had recovered into Hotchpot with the Orphanage, tho' after the Eſtate is divided into Thirds, and not into Hotcpot with the whole Eſtate; and decreed accordingly, *Beckford*'s Caſe.

Prohibition lies, if ſued elſewhere.

This Court of Orphans is ſuch a peculiar Court; that if any Orphan Sue in the Eccleſiaſtical Court for any Goods, Money, or Chattels due to them, or by the Cuſtom of *London*, or for any Legacy, or to have an Account, a Prohibition lies, 5 *Rep.* 73.

Note,

Note, The Security muſt take particular care that none of the Orphans Marry, or be put out Apprentices, without the leave of the Court of Aldermen firſt obtained for that purpoſe.

Orphans not Marry, or be put out Apprentice, without leave of this Court.

The Court of Aldermen do Commit the Cuſtody of Orphans to ſuch perſon and perſons as they ſhall think fit, and if any perſon do Intermarry with any Orphan without the conſent of the ſame Court firſt obtained, ſuch a perſon may be fined by them according to the Quality and Portion of the Orphan, and unleſs ſuch perſon do pay the Fine, or give Security to pay it, the Court may commit him to Newgate to remain there, till he ſubmit to their Order, and this hath been adjudged good in the Court of *Kings Bench.* And it was one *Wilkinſon*'s Caſe, againſt Sir *William Bolton*, *Paſch.* 17. *Car.* 2.

Marriage without conſent is fineable, and impriſonment till payment.

An Action of Treſpaſs was brought for Battery and falſe Impriſonment, The Defendant juſtifies by the Cuſtom of *London*, of the Court of Orphans, and that a Freeman died and left his Daughter under 18 years of age, for ſuch is the age of a Female and unmarried; and that the Court committed the Cuſtody of her to Sir *William Bolton*, and ſet forth the Cuſtom, that if any ſuch Ward be taken away, *&c.* they may commit the party to *Newgate*, who does this, to be Impriſoned till he produce the Infant, or be delivered by due courſe of Law, and becauſe the Plaintiff took her

away, he was committed, *p.* 17. *Car.*2. *Wilkinſon and Sir William Bolton.*

The Plaintiff Demurs upon this Plea.

1. Becauſe the cuſtom to Impriſon is unreaſonable, for that no time is allowed to the party to make his defence.

2. And its general, to Impriſon all, and ſo a Peer may be Impriſoned. But by the Court, its a great Offence and Contempt, and the Cuſtom is reaſonable; but there ſeemed to be a fault in the Plea. For the Bar was, That the Infant was of ſuch an age, and unmarried at the time of the Death of the Anceſtor; but does not ſay ſhe was unmarried at the time of the taking. But it was Over-ruled, for that a Bar ſhall be good to common intent. *Vide* the Caſe reported in *Raymond p.* 116.

Pleading. Bar good to common intent.

The cuſtom extends to Lands out of *London*. *Quær.* if a Freeman diſcontinue his Trade and the City.

Note, This Cuſtom to have the cuſtody of the perſon, and of all the Eſtate real and perſonal, extends to Lands out of *London*. But it hath been a Queſtion, If a Freeman diſcontinue from the City, and his Trade, and dies, leaving his Children and Eſtate in the Country, Whether the Court of Orphans ſhall intermeddle with them? And it was the Opinion of *Hide* Chief Juſtice, That they ſhould not intermeddle.

What a Freeman may deviſe by Will.

By the Cuſtom of *London*, a Freemans Widow may require a Third part of his perſonal Eſtate after his Debts paid and the Funeral diſcharged, and his Children may require another Third part thereof, and he may

may by his Will give away another Third part of his Eſtate; but if he have no Children, the Widow may require a Moiety of his perſonal Eſtate; but a Freeman in the time of his Sickneſs, cannot give away any part of his Eſtate. But if a Freeman dye without a Will, Adminiſtration ſhall be granted to his Wife, and ſhe will claim one Third part, and one Third muſt be divided amongſt the Children, and the other between the Wife and Children, and uſually, the Widow is allowed two Thirds of the Freemans Eſtate.

The Cuſtom of *London* as to the perſonal Eſtate.

If a Father is a Freeman of *London*, he cannot deviſe the diſpoſition of the Body of the Infant, and if he do, yet the Infant ſhall remain in the cuſtody of the Mayor and Aldermen. And as well the Statute of 4 and 5. of *Philip and Mary c.* 8. concerning the taking of Infants Females out of the Poſſeſſion of the Gardian, as the Statute of 12 *Car.* 2. *c.* 24. which impowers Fathers to diſpoſe of the cuſtody of their Children, there are Proviſoes to ſave the Cuſtom of *London*, and alſo of other Vills, *Sid.* 363. *Baſtian*'s Caſe.

A Freeman cannot deviſe the diſpoſition of the body and cuſtody of an Infant

*A. B.* an Orphan of *London* Married to *W. P.* before he was at the age of 21 years, and not having taken out the Money dies, having bequeathed this Money to his Wife, provided ſhe ſhould not claim Dower; ſhe brought Dower againſt *P. P.* Brother of *W. P.* her late Husband. He brings a Bill in *Chan-*

Orphans Money in the Hands of the Chamberlain, not deviſeable by the Husband.

*Chancery*, to make diſcovery of the Eſtate, and to compel her to releaſe Dower, or renounce the Deviſe. The Queſtion is, Whether the Money in the Court of Orphans where Deviſable or not.

*Per Bridgman* Keeper, *Twiſden* and *Wild*, it is a *choſe en Action*, and ſo not Deviſeable. The Cuſtom of Orphans is under age, they find them Money (that is) for its Maintenance and no more; yet when the Orphan comes of full age, or the Female Marries, it is caſt up, and the Intereſt is fully paid: In this Caſe it was the Laches of the Husband, that he did not recover it, for by the Cuſtom it is to be paid at the full age, or Marriage of the Female Orphan, And the Cuſtom is upon the Marriage of Orphans, to appoint the Common Serjeant to Treat and take Security for the Orphan, 2 *Ventries* 240. *Pheſant's* Caſe.

when the Orphans Money becomes payable by the Cuſtom.

It is the Cuſtom of *London*, That if any Freeman of *London* Deviſe a Legacy to an Orphan, That the Executor ſhall be conſtrained to find Sureties to pay the Legacy according to Law. *Quær.* If this Cuſtom be good, for perhaps he ſhall not have Aſſets after Debts paid, 1 *Rolls Rep.* 316.

It was adjudged in *Hanmond and Honywood's* Caſe in *Chancery*, 32 *Car.* 2. That by the Cuſtom of *London*, a Declaration made by a Freeman by Writing, tho' ſuch

What is a good Declaration of cuſtomary part.

such Writing were made for his last Will and Revoked, is such a Declaration as will let in the Child to have a Customary part of the personal Estate.

CHAP.

## CHAP. XVIII.

### *Of Trials. Judgment. Execution.*

Regula. *Infancy, where and in what caſes tried by Inſpection, Proofs or* per Pais. *Infant himſelf examined on a* Voire dire. *The manner of Trial by Inſpection and Proofs. Re-inſpection granted, and why. Non-age, where tryed, in the County where the Land lies, or where the Action is brought. The birth of an Iſſue, where it ſhall be tryed. Judgment againſt Infant* quod capiatur, &c. *No Execution againſt an Infant-Heir. Trials in* ætate probandâ.

THe Trial of Infancy, the manner and place where to be tryed comes next to be treated of.

Its laid down as a Rule:

Regula. In all caſes where the Matter may be tryed by the examination of the Juſtices, they may, if they be in doubt, refuſe that, and compel the party to put it upon Trial *per Pais. Per touts Juſtices*, as in caſe of Infancy.

Infancy tryed by Inſpection *per* Proofs, or *per Pais.* Now I ſhall recite ſome Reſolutions, where and in what caſes Infancy ſhall be tryed by Inſpection, by Proof, or *per Pais.*

In

In Error to reverſe a Fine for Nonage, or in *Audita Querela* to reverſe a Statute or Recognizance for Non-age, the Age ſhall be tryed by Inſpection of the Juſtices, and not by *Pais:* But if an Infant appear by Attorney, this is Error; but it ſhall be tryed *per Pais*, and not by the Juſtices: For the making of the Warrant of Attorney is the act of the party, without the Examination of the Juſtices. In what caſe Nonage ſhall be tryed by Inſpection. *Per pais*, Infant appearing by Attorney.

If the Tenant in a Real Action vouch *A.* as Heir within age; or if Tenant for life be impleaded, and pray in aid of one in Reverſion within age, and prays that the Parol ſhall demur, &c. there if the Demandant reply, that he is of Full age, this ſhall not be tryed by *Pais*, but a Writ ſhall be directed to the Sheriff, (*viz.*) By Inſpection.

**Quod Venire fac tali die A. ut per aſpectū coꝛpoꝛis ſui conſtare poſſit p̄dictis Juſticiariis noſtris ſi ſit plene etatis necne, &c. non teſtiū teſtimonio, non Juratoꝛum veredicto ſed judicij Inſpectione.**

But the Judges (as is uſual) by *adminicula* may inform themſelves by Witneſſes, by Church-Books, &c.

In Account againſt Baylee (*Account Fitz.* 121. 12 *Aſſ.* 37.) Infancy ſhall be tryed *in Pais.* 9 *Rep.* 31. Account *per Pais.*

If

Appeal *per inſpect.* If an Appeal be brought by Infant, the Infancy ſhall be tryed by Inſpection, 11 *H.* 4. 94.

Error *per inſpect.* In a Writ of *Error* to reverſe a Judgment, if Non-age be alledged for Error, this ſhall be tryed by Inſpection. So upon a Common Recovery, or to reverſe a Fine, *Anne Hungate's* Caſe. *Vide ſupra. Dyer* 104. *Com. Trin.* 11 *Car. B.N. Scawen* and *Arundel.*

By Proofs *per Pais.* Trial of Inſpection in caſe of Dower is by Proofs in caſe of Death *per Pais.* In a *Dum fuit infra ætatem*, Infancy may be tryed *per Pais*, 1 *Keb.* 929.

Where the party is of full Age *per pais.* If the Queſtion be, Infant or not? if the party be of Full age, it ſhall be tryed *per Pais*, *Bulſtr.* 7 *Jac. Moreton* and *Ords.*

*Parol* demur. If the Parol be prayed to demur for the Non-age of one party, and the Non-age is confeſſed by the other party, the Parol ſhall be adjudged to demur without inſpection of the Infant, 29 *Aſſr.* 37 *Adjudge.*

If Infant appear by Attorney in Action brought againſt him, in which he ought to have appeared by Guardian, and after Judgment is given againſt him, being within age, and after in a Writ of *Error* he aſſigns this for Error; this ſhall not be tryed by Inſpection, but by Proofs; for if he be now of full age Judgment ſhall be reverſed; and the firſt Judgment was reverſed.

By Proofs.

*Trin.*

*Trin.* 39 *El.* B. R. *Sydbery* and *Raum*, but cited by the name of *Selborough*'s Caſe, in *Cro. El.* 580. *Stone* and *Marches* Caſe. The Defendant in Debt confeſſeth the Action by Attorney, and aſſigns for Error that he was within age at the time of the Confeſſion; and they were thereupon at Iſſue, and tryed *per Pais*, *Cro. El.* 580. *Selborough*'s Caſe.

Confeſſion in Debt *per Pais.*

Infant brought a Writ of *Error* by Guardian, to reverſe a Judgment given againſt him, in which he appeared by Attorney, and aſſigns for Error, That he was within age at the time of the Judgment given againſt him, he appearing by Attorney; this ſhall not be tryed by Inſpection, but *per Pais*, *Trin.* 11 *Car.* 1. B. R. *Scawen* and *Arundel.*

Appearance by Attorny *per Pais.*

*Bartholowew* brought a Writ of *Error*, for that *Dighton* recovered againſt him in an Action of *Impriſonment*, in which he being within age did ſue by Attorney, and the Judgment was reverſed, and the Non-age was tryed *per Pais*, *Bridgm. Rep.* 75.

The Court may examine Infant upon a *Voire dire*, whether he be within age, 11 *H.* 4. 45.

Infant himſelf examined upon a *Voire dire.*

In

In Tryal at Bar the Queſtion was, if one was at full age at the time of the Will made by him. To prove his Non-age, the Defendant produced an Almanack, in which his Father had writ the Nativity of the Deviſor; and it was allowed to be ſtrong Evidence, *Raym.* 84. *Herbert* and *Tuckal.*

The manner of Inſpection.

As to the manner of Inſpection, and the *Adminicula* the Judges uſe, I find,

That in a Writ of *Error* to reverſe a Fine levied by Infant *Feme Covert*; the Court was moved for a Day to bring in the party that levied the Fine to be inſpected, which was granted, and at the Day ſhe was brought into Court and viewed; and two Witneſſes depoſed, That ſhe was within Age at the time of the Fine levied, which was entred upon the Roll: Upon which the Iſſue was tryed, *Styles* 451.

And in *Sherlock*'s Caſe, *Stiles* 456. upon Tryal by Inſpection, *Affidavit* was made by one in the Court who knew the Infant that was there preſent, and the time of her Birth and being Baptized, and ſwore the Day preciſely. The Church-Book was alſo produced in Court, and proved by Oath wherein the time of her Baptizing was entred, and that ſhe was the ſame perſon; and the *Affidavits* were recorded, and the Inſpection entred, and ſhe had a Guardian aſſigned her by her own election; and a *Scire facias* was awarded againſt the Heir, *Stiles* 456.

It

It was prayed that an Infant might be inſpected to reverſe a Fine, and foraſmuch as he had not his Proofs there, he was not inſpected; but *dies datus eſt uſque Octab' Michaelis proximæ*, at which time the Infant came the Day which was wont to be the Day of Eſſoyn, and prayed *Juſtice Croke* (who was there to adjorn the Term) to inſpect him and take his Proofs, which he did *de bene eſſe*.

And now before the Month of *Michaelmaſs* the Infant came of full age; and whether this Inſpection was well taken, was the Queſtion.

*Per Cur.* The Day of Eſſoyn is a day in Term, and the Court was full, tho' there was but one Judge; and if the Inſpection had been the day of Eſſoyn, and before the *quarto die poſt* he had come of full age, this ſhall be very good.

But the Doubt was, if upon the Day of Adjornment the Judge had power to do any thing, but to adjorn the Term. *Qu. de hoc.* 2 *Brownl.* 278. Inſpection on the Eſſoyn-day, if good.

The Court was moved in behalf of an Infant to diſcharge a Guardian aſſigned by the Court, and to make another, and that the former Inſpection may be diſcharged, and that the Infant may now be inſpected again; becauſe there was no Action depending in Court againſt the Infant, when the former Inſpection was; and it was granted, *Stiles* p. 456. Reinſpection granted, and why.

Error was brought to reverse a Fine for Infancy; it was moved, that the party being in Court she might be inspected, and the Inspection recorded; and there was produced a Copy of the Register-Book, sworn to be true, and several Affidavits of her Age.

*Per Cur.* Let the Inspection be recorded. The Issue of her Infancy may be tryed at any time hereafter, tho' she comes of age, 1 *Ventr.* 69. *Cousin's* Case.

Error is assigned in Fact (in *Action sur Case*) that he was an Infant, and shews no place where he was an Infant. To this Error the Plaintiff pleaded that he was of full age, and it was tryed at *H.* in *Suffolk*.

*Whitlock Just.* Every *Venire fac'* properly is to be from the place where the Writ is brought, unless it be drawn away by Plea. This is new Matter and not helped by the Statute of 20 *Jac.* The Matter is collateral to the first Record, and it is a new Record upon Error.

*Per tot. Cur.* Its out of the Statute, and a Repleader was granted; for there is no Tryal, nor no *Venire*. But if in this Action he had alledged a place of his Infancy, *scil.* at *Dale*, and the *Venire* had been of *Sale*, there the Tryal had been good, *Godb.* 381. 2 *Rolls* 373. *Latch.* 194. *Tayler* and *Tollwin*.

*Where*

*Where Non-age ſhall be Tryed.*

It hath been much Argued where Non-age ſhall be Tryed, whether in the County or place where it is alledged, or where the Land lies, and it is Reſolved as follows, with the Diverſity:

Non-age. Where tryed in the County where the Land lies. or where the Action is brought.

Error was brought, for that Judgment was given by default againſt the Defendant, being an Infant; Iſſue was taken that he was of Full age, and the Queſtion was, where the Iſſue ſhall be tryed, Whether in *Norfolk*, where the Land lies; or in *Middleſex*, where the Action was brought? And, *per Cur.* it ſhall be tryed in the County where the Land lay, *Cro. El.* 818. *Green* and *Roſſe.*

And ſo is *Morgan* and *Vaughan*'s Caſe:

Error was of a Judgment in the Grand Seſſions at *Brecon*; Error aſſigned was, That the Tenant within age appeared by Attorney; and alledgeth, that he was within age at *Abergaveney* in the County of *Middleſex*, and Iſſue being joyned in the County of *Monmouth*. And Iſſue was joyned upon the Non-age, the Tryal was by a Jury of the *Venue* of *Abergeveney*, and found for the Plaintiff in Error.

It was moved in Arreſt of Judgment, That the Plaintiff in this Writ of *Error* appears by Attorney, and he was within age at the time of the Writ brought, as appears by the Record: For it is alledged, That 7 *Septemb.* 20 *Car.* 2. he was within age, *videlicet*, the age of Fourteen years, and no more; and he brought the Writ of *Error* 14 *July*, 26 *Car.*2. and in the Term following aſſigns the Error.

(*Videlicet*) where no Eſtoppel.

*Sed non allocatur*; for the (*Videlicet*) is not the material part of the Iſſue; and the (*Videlicet*) goes not to the right of the Action, and ſo cannot be an Eſtoppel.

2. It was ſaid, That Tryal for Dower being a Real Action, Error upon it is of the ſame nature, and every Iſſue joyned in this ought to be tryed where the Land lies: And to *Green* and *Roſſe*'s Caſe the Original Action was *Ejectione firmæ*; but here it is Dower.

Diverſity.

But *per Cur.* the Tryal is good enough; and the difference was taken as to the nature of the Original Action, where the Title depends upon the Non-age alledged, and where the Non-age is pleaded, as it is here by Matter *debors*.

In the firſt Caſe the Tryal ſhall be where the Land lies, and not ſo in the other. And Judgment was given for the Plaintiff in Error, *Sir Tho. Jone*'s Rep. 170. *Morgan* and *Vaughan*, *Green* and *Roſſe*'s Caſe.

If

If A recover againſt B. in *Ejectione firmæ* in *Durham*, upon which B. brought Error in B. R. at *Weſtminſter*, and aſſigns for Error, That the ſaid A. at the time of the Tryal of the firſt Action was *commorans*, and within age at *Weſtminſter* in *Middleſex*, and that he ſued in the ſaid Action by Attorney, and upon the Non-age the parties are at Iſſue; this ſhall be tryed at *Weſtminſter*, and not at *Durham*, where the Land lies; becauſe that the *Ejectione firmæ* is not any Real Action; and inaſmuch as it is ſpecially alledged, that he was within age, and *commorans* at *Weſtminſter*, where the Writ of *Error* is now brought, 1 *Brownl.* 150. *Trin.* 11 *Jac.* B. R. *Ords* and *Moreton*. In *Ejectione firmæ*.

And in the Report in *Bulſtrode* of this Caſe, the difference is taken in Real and Perſonal Actions.

Infant pleads, That at the time of making the Releaſe of all his Right he was within age, and born in another County; yet the ſame ſhall be tryed where the Land is. *Aliter*, in Perſonal Actions, 1 *Bulſtrode* 134.

If Iſſue be, Whether D. were born before Marriage at A. or within Marriage at B. in the ſame County; this ſhall be tryed in both Vills, 11 *H.* 484. The Birth of an Iſſue, where it ſhall be tryed.

In an *Assize*, if the Birth of him who claims as Heir be alledged in a Foreign County, and the Issue is whether he be Heir; this shall be tryed where the Land is, and not where the Birth is alledged; for the Inheritance is the Principal, and where the Land lies it may be best known who is to inherit, 46 *Ass.* 5. *fo.* 355 *b. Adjudged.*

If the Issue be between the Heir and a man who claims to be Tenant by the Courtesie, whether he had Issue by the Wife during the Coverture in a Foreign County; this shall be tryed where it is alledged, 13 *H.* 4. 4.

*Stat. Glouc. c.* 2. explained.

The Statute of *Gloucester*, *cap.* 2. gave the Infant a Tryal during his Minority; but it gave it him in such Actions, as he might not be fore-closed in his Right: But tho' he were barred in any of the said Actions, (Actions *Aunceſtrel poſſeſſory*, *Mortdaunceſter*, *Ayel*, *Beſayel*, *Coſinage*) during his Minority, he may have recourse to a Writ of an higher Nature, so as he should not be remediless, nor any final Judgment given against him during his Infancy; and therefore the *Formedon in diſcender*, which is in nature of his Writ of *Right* for the Issue in Tail, he can have no Writ of an higher nature, and therefore is not within the Statute, 2 *Inſt.* 291.

Infant

Infant, who was party to an Ejectment in a Tryal at Bar in the King's-Bench, Anſwered to a Bill in *Chancery* by Guardian; that Anſwer ſhall not be read in Evidence againſt the Infant, 1 *W. & M. Leigh* and *Ward.*

Judgment againſt an Infant was reverſed becauſe it was *Capiatur.*

The Caſe was:

*Ejectione firmæ* was brought againſt Four, whereof one was an Infant and appeared by his Guardian; and upon *Not guilty* pleaded, and found for the Plaintiff, Judgment was given againſt them, *Quod capiantur.* And in Error aſſigned for that cauſe it was reverſed, tho' the Treſpaſs is *Vi & armis*; and ſo *ſon tort demeſne*, *Cro. Jac.* 274. *Holbrook* and *Doyly.*

Judgment.

*Capiatur.*

Aſſault and Battery againſt Three: Error was brought, That all the Three appeared by Attorney and pleaded, whereas one was within age, and ought to have pleaded by his Guardian, and Judgment entirely was given againſt them all, and it being void as to the Infant, muſt be void againſt all. So Judgment was reverſed for the whole, *Stiles* 121, 125. *Aylet* and *Oats.*

By default. If Judgment be given againſt an Infant by default, after the Default he ſhall have a Writ of *Error*, and reverſe the Judgment for his Non-age; but if he make default after Appearance, Judgment ſhall be given againſt him. *Vide ſupra.*

No Execution againſt an Infant Heir on Recognizance, Stat. Merch. or Staple. No Execution ſhall be ſued againſt the Heir within age.

If a man hath a Judgment given againſt him for Debt or Damages, or be bound in a Recognizance, his Heir within age; or having two Daughters, the one within age; no Execution ſhall be ſued of the Lands by *Elegit*, during the Minority, albeit the Heir is not ſpecially bound, but charged as Tertenant.

So againſt an Heir, within age, no Execution ſhall be ſued upon a Statute Merchant, or Staple, or Recognizance, upon the Statute of 23 *H.*8. for it is excepted in the Proceſs againſt the Heir.

Neither if the Heir within age endow his Mother, ſhall Execution be ſued againſt her during his Minority, 1 *Inſt.* 290. *a.* 3 *Rep.* 13. *Sir William Herbert*'s Caſe.

Note,

Note, By the Statute of 27 *Ed.* 3. the Execution of Lands upon a Statute-Staple, is referred to the Statute-Merchant; and by the Statute *De Mercatoribus* no Execution shall be had against the Heir, so long as he is within age.

The Tryal of Full age in *ætate probanda*, must be by Jurors of Forty two years Old, or upwards, *Hob.* 325. 1 *Brownl.* 45. Tryal in *ætate probandâ.*

CHAP.

## CHAP. XIX.

### *Of Remedies for Tortious acts done to Infants.*

IF a Ward be taken out of the poſſeſſion of the Guardian, an Action in the nature of a *Raviſhment of Ward* lies.

By the Statute of 4 & 5 *Ph. & M. cap.* & it ſhall not be lawful to take away any Maid or Woman Child unmarried, being within the Age of Sixteen years, out of the Cuſtody and Governance, and againſt the Will of the Father, or of ſuch perſons to whom the Father by his Laſt Will and Teſtament, or other act executed in his life-time, ſhall appoint, under pain of Impriſonment for two years; and the Penalty for taking away and marrying ſuch Woman Child, is Impriſonment for Five years, or Fine.

If any Woman Child above the age of Twelve, and under the age of Sixteen years, conſent to ſuch Marriage, then the next of Kin, to whom the Inheritance of ſuch Maiden ſhould diſcend, ſhall enjoy the ſame during her life.

This is meant of Heireſſes, or other conſiderable Fortunes: But the Cuſtoms of *London*, as to Orphanage are ſaved.

Now

And in *Pasch.* 20 *Car.* 2. the Case was:

Father and Son were indicted for taking with force *M. T.* out of the possession of *Corriter* a Brewer in *London*, and marrying her to *B.* the Son within the age of Sixteen years, against the Will of C. the Guardian, contrary to the Statute.

And upon the Tryal the Case appeared to be:

That *T.* the Father of the Infant, a Freeman and Alehouse-keeper of *London*, by his Will devised the Custody of this Infant to C.

C. obtains a Warrant from the Mayor of *London*, for taking the Infant; and he was Taken, but Rescued: And after he had a Warrant from the Lord Chief Justice.

Upon this Evidence they were acquitted of this Indictment:

Because the Devise was void; and the Indictment ought to have been, for taking her out of the possession of the Lord Mayor, &c. And,

2. There ought to be a Taking out of the actual Custody of the Guardian; and he ought to be the right Guardian, *Sid.* 362. *The King* against *Bastian.*

And

And in 24 *Car.* 2. the Court Fined *Story* 100 *l.* and bound him to his good Behaviour for Five years, on Information for deceitful taking away out of her Mothers Custody Mistress *Gibbon*, under Sixteen years of age, with intent to marry her, and Riot, &c.

*G.* was Fined 50 *l.* and good Behaviour for a Year, who was a Woman assistant in the Exploit, and found only guilty of the Deceit, 3 *Keb.* 101.

This is punishable, as a Riot too, at Common Law.

Whether the Woman be Widow, or not, she is under the protection of this Law.

Averment. And tho' this Statute should be Repealed as to the Fine, yet an Information lies for the Contempt against the Prohibitory part.

It was said *existens* of Fourteen years of age, and under Sixteen; its a sufficient Averment.

As on Custom of *London*, to devise in Mortmain *existens* a Freeman is sufficient, referring only to the Quality of the Person, 3 *Keb.* 708, 715. *Rex* verl. *Moor.*

*Design*

*Deſigny*, a *Jamaica* Merchant Spirited a Boy from *Merchant-Taylors-School*, and upon Information was found Guilty at *Guild-Hall*, before the Lord Chief Juſtice *Pemberton*, and appeared next Term in the Kings Bench, and was Fined 500 *l.*

And becauſe he was likely to procure a Pardon, the Court ordered the Father to bring an *Homine replegiando*; and he did ſo.

And an *Elongatus* was Returned by the Sheriff, and he was charged with it in Priſon.

But they would not Bail the Priſoner upon the *Withernam*; but upon his bringing a Thouſand pounds in to be forfeited, if he produced not the Child within ſix Months, *Raym.* 474. *Deſigny*'s Caſe.

Rape, is an unlawful and Carnal knowledge of any Woman above the age of Ten years, againſt her Will; or a Woman Child, under the age of Ten years with her Will, or againſt her Will, it is Felony without Clergy, 18 *Eliz. c.* 6. 3 *Inſt.* 60.

*Cornwall* and his Wife were Indicted for ſeducing an Apprentice to an Houſe of Debauchery, and cauſing him to conſume great Sums of Money of his Maſters.

And

And after the Defendants were found Guilty by Verdict, and put a Demurrer into Court, and ſhew for Cauſe, Tha tthis is not Indictable.

But *per Cur.* Demurrer ſhall not be upon Indictment after Verdict; notwithſtanding *Co. Ent. p.* 363. *a. b.* which Preſident is not Law, *Sid.* 208. *Le Roy* verſus *Cornwall and his Wife.*

CHAP.

## CHAP. XX.

*Of Childrens Portions, either by Wills or Settlements; and Reſolutions at Common Law or Equity concerning the ſame.*

AS to the Conſtructions of Laſt Wills and Settlements, concerning Portions and Legacies left and given to Children, our Law is full of Reaſon, Juſtice and Equity: And I durſt challenge the profoundeſt Doctors of the Civil Laws, to ſhew more firm and ſolid Reſolutions in all their Codes, Pandects and Volumes upon thoſe Points. I ſhall produce ſome, which are and may be of daily uſe, and therefore ought not in a Treatiſe of this nature, to be totally omitted. *Vide ſupra*, tit. *Deviſes*.

*Lord Pawlet* had made a Settlement of his Eſtate, and had charged by Deed his Land for payment of 4000 *l.* to two Daughters at their reſpective Ages of One and twenty years, or day of Marriage; and left himſelf a Power of otherwiſe ordering it by his Will: And he by his Will in Writing, made ſome ſhort time after, Deviſed thus:

Portion in Money deviſed according to a Settlement, and Legatee dies before the time limited for payment, who ſhall have it.

*I bequeath to my two Daughters A. and B. 4000 l. apiece, to be reſpectively paid to them for their Portions, in ſuch manner as I have provided by the ſaid Settlement.*

One of the Daughters died before Marriage, or the Age of One and twenty years.

The Lady *Pawlet*, Mother of the ſaid Daughters, took out Letters of Adminiſtration to the Daughter that died; and preferred a Bill in *Chancery* againſt the Truſtees for the 4000 *l.* and againſt the Heir, to whom the benefit of the Land (after the Money raiſed) was appointed.

The Queſtion was, If this Money raiſed ſhould go to the Adminiſtratrix; or the Lands be diſcharged thereof, and accrue to the benefit of the Heir?

It was agreed, That if this had been a Legacy, or Sum of Money bequeathed by the Will, altho' the party had died before the age of One and twenty, or Marriage, the Adminiſtratrix ſhould have had it; for the Legatee in ſuch caſe is to have it as a preſent Intereſt, tho' the time of payment be future; becauſe it chargeth the Perſonal Eſtate, which is in being at the time of the Teſtator's death; and if the Legacies by ſuch an accident ſhould be diſcharged, it would turn to the benefit of the Executors, whereas the Teſtator did never intend it.

But

But here this Sum of Money is appointed to be paid by a Deed, and is a Truſt charged upon the Land; and Truſts are guided and governed by the intention of the Parties, and the Perſonal Eſtate is not charged: And this Sum of Money doth not lye in demand by a Suit, as where a Legacy is deviſed, only a Bill may be preferred to have the Truſts performed. Truſts.

And tho' it was much inſiſted on for the Plaintiff, that here the Will bequeaths the Money, yet that refers to the Deed, and orders it to be paid in ſuch manner as was thereby appointed.

And the Court decreed it for the Heir at Law, 2 *Ventr.* 366.

So was *Wood* and *Caley*'s Caſe, 13 *Car.* 2.

The Will was,

That the Executor ſhould ſell the Perſonal Eſtate of the Teſtator, and by the Money raiſed thereout, to purchaſe Lands for the uſe of *A.* and her Heirs.

*A.* dies without Iſſue before any Purchaſe made.

It was decreed, That the Adminiſtrator of *A.* ſhould have the Moneys out of the hands of the Executors.

Who ſhall be ſaid younger Children, to take benefit of a Deviſe.

C. P. by his Will deviſed Lands to his Truſtees, that they ſhould out of the Profits thereof, pay unto the younger Children of his Daughter *M.* Four hundred pounds, equally to be divided, and ſhe had ſix Children, ſo that five of them are within the intent of the Will, to have 80 l. apiece.

And ſo it was decreed by the Court, tho' the Heir at Law inſiſted, That they are elder in Seniority of years than he himſelf, being a younger Child than any of them, and that younger Children in this Caſe, is to be taken as diſtinguiſhed from the Heir at Law, 14 *Car.* 2. *Mead* and *Cave.*

*Corbet* and *Morris*, 17 *Car.* 2.

The Plaintiff, as Executrix to her Husband, ſets forth,

That Sir *J. Corbet*, Father of *Vincent Corbet*, the Plaintiffs late Husband, by Settlement made 1652. appoints 1000 *l.* apiece to every one of his Children named (of which *Vincent* was the eldeſt) as ſhould be then unmarried, or not provided for at the time of the deceaſe of Sir *John Corbet*, at their reſpective Ages of One and twenty years ſucceſſively, according to the Seniority of Age.

*Vincent*

*Vincent* was married to the Plaintiff, in 1642, privately. He had Three hundred and fifty pounds with his Wife, and had no proviſion made for him, but Thirty pounds *per annum*, for Seven years, if the Father lived ſo long.

*Vincent* makes his Will, and deviſeth, That if Sir *J. Corbet* his Father dye, and leave him any Real or Perſonal Eſtate, that the Rents and Profits thereof ſhall be to his Wife for her Life; and all the reſt of the Eſtate he gave to his Wife, and made her ſole Executrix, and dies.

Sir *John* dies without altering the Settlement, and there is received out of the Profits of the Lands One thouſand pounds over the Debts of Sir *John*; but not enough to pay the other Children.

Deviſee and Executrix to have the benefit of a Portion, limited to her Huſband.

The Queſtion is, Whether the Plaintiff, Deviſee and Executrix of *Vincent*, who was married and died without Iſſue in his Fathers life time, ſhall have the Thouſand pounds limited to her Husband.

The Court decreed, She being Relict, Deviſee and Executrix of *Vincent*, ought to have the benefit of the ſaid Portion and Intereſt limited to her Husband.

In *Hartwell* and *Ford's* Case the words of the Will, upon which the Question arose, were these:

*If it happen my Daughter* Charity *to dye before she shall have accomplished the years of a Lawful Age, then the whole Profits of the Premisses (being a Lease) to remain and be to* William *my Son; and if* William *dye before the like Lawful Age,* Charity *and* William *having no Issue of their Bodies, then all the whole Term and Profits I give and devise to all my Sisters Children, to be equally divided amongst them.*

*Charity* made a Will at Eighteen, and died.

The Question was, Whether the Plaintiff, as Executor to *Charity*, had right to the Premisses, or the Heir of *William* the elder, who Administred to *William Ford* the younger, Brother to *Charity*; or whether the same belonged to the Sisters Children of *Lionel Ford*?

The Construction of the word (*Lawful Age*) in a Will.

And the Chancellor and Judges decreed, That a Lawful Age, in General words (unless it be in a Particular case) must be construed and taken to be One and twenty years; and that the said remaining Term, according to the

the Conſtruction of the Will, belongs to the Siſters Children of the ſaid *Lionel Ford* only.

*J. M.* by his Will deviſed the Rents, Iſſues and Profits of all his Meſſuages, during his Intereſt therein, to his Wife for Life, and if ſhe died before the expiration of his ſaid Intereſt, then the ſame to come amongſt all his Children equally.

Deviſe to an Infant in *Ventre ſa mere.*

And the Teſtator conceiving his Wife to be with Child, deviſed to the Child ſhe then went with, a Leaſe of two Houſes, and ordered a Moiety of the Profits thereof to be put out by the Overſeers of his Will, as a Stock for the benefit of ſuch Child, and the other Moiety for its maintenance till Age, or Marriage.

And by his Will further declared, That if all his Children ſhould dye before Marriage or Age of One and twenty years, then the Premiſſes deviſed to his Children ſhould remain to Brothers and Siſters Children; and that Four of the Teſtator's Children died before One and twenty or Marriage, and *Alice*, who was not born at the time of the Teſtator's death, is only living.

The Court conceived, That the collateral Line have nothing to do with the Eſtate of the Teſtator during the Life of *Alice* the Daughter, *Marſh* and *Kirby* 10 *Car.* 1 *in Canc.*

A Woman who was poſſeſt of a Term for divers years had Iſſue two Daughters, the one married to *A.* the other to *B.* *A.* had Iſſue four Daughters, and *B.* had Iſſue alſo.

Legacies deviſed to Children, the Money decreed to the Parent, the Executor refuſing to give Security.

She deviſed Legacies to the Children of *A.* out of the Rent of the Leaſe, and made *B.* Executor, and died.

*A.* required *B.* (in behalf of his Children) to pay the Money to him, that he might employ the ſame for the benefit of the Children; which he refuſed.

Whereupon he Sued him in the Spiritual Court; and there Sentence was given for the Plaintiff.

*B.* the Executor moved for a Prohibition, and alledged for the ground of it, That he was Executor, and chargable for the Money in Account; but it was deny'd, becauſe he came after Sentence, and becauſe he refuſed to give Security for the payment of the Legacies to the Children; *Godb. p.* 243. *pl.* 337. *Ayliff* and *Browne.*

*A.M.* makes his Will in Writing, *An.* 1649. and gives a Legacy to his Neece, in theſe words:

*I do give to my Neece* H. L. *the Sum of Five Hundred pounds, which my Siſter the Lady* Chomley *hath now in her hands of mine, and by her Bond made to me appears.*

And makes no Executor, and dies in *Octob. Anno* 1669. About 10 years before his Death the Lady pays him in the Five hundred Pounds.

The Queſtion is, Whether this Legacy was due.

And *per Cur.* it is due, tho' the Security was altered.

So was *Hill.* 1671. *Skib* and *Chichley*'s Caſe, Where the Lady *Verney* gave Legacies out of Moneys then at Intereſt, and called in before the Teſtator's death, *Raym.* 335. *Pawlet*'s Caſe.

Will void at Common Law made good in Equity.

If the Father deviſe Lands to his youngeſt Son by Will in Writing; and the eldeſt Son knowing this enters into the Land and diſſeiſeth the Father, and ſo continues till the Death of the Father, by which the Will is void; yet for that this is made void by Deceit and Covin, it ſhall be made good in *Chancery*, *Roſwell*'s Caſe *in Canc. Mich.* 16 *Jac.* 1.

Sale by Infant not aided in *Equity.*

If an Infant ſell Lands for Money, and purchaſe other Lands with the Monies; yet this Sale made by the Infant ſhall not be avoided by the *Chancery*, becauſe the perſon of the Infant is diſabled by a Maxim in Law, *Roſwell*'s Caſe *in Chancery.*

Infant Decreed to pay an Annuity.

A Copyhold was Sur-rendred to the uſe of an Infant, to the intent he ſhould pay an Annuity to another at full age, which he refuſed to do; and it was declared, he ſhould pay it and the Arrears, *Sawyer*'s Caſe.

Infant of 12 years old bound by a Decree.

In the Caſe of *Wadham and Moore*, an Infant was bound by Decree, albeit he was but 12 years of Age.

Infants forecloſed.

The Court of *Chancery* will ſometimes Decree Infants to be forecloſed before they come of age, and yet but rarely, 2 *Ventr.* 351.

The *Eccleſiaſtical Court* may hold Plea of a Childs Portion, but not of the cuſtody of the Body, 3 *Keb.* 834.

When Lands to be charged or not with Portions upon the word of a Will.

The Lands were Deviſed by Will to Truſtees for 99 years on Truſt, if he left no Son, or ſuch as ſhould dye before 21 years without Heirs Males, and ſhould leave one or more Daughters 12000 *l.* if but one Daughter, or if two or more Daughters then 20000 *l.* to be raiſed for their Portion, payable at 21 years, or day of Marriage, 29 *Car.* 2. *Stawel and Auſtin in Chancery.*

The Teſtator dies having only 3 Daughters, *Urſula*, *Elizabeth* and *Ann*, *Ann* died ſince her Father. The Teſtators relict Married *S.* ſhe on *Ann*'s death Adminiſtred to her, and died, leaving *Ann*'s Portion in the ſaid 20000 *l.* unadminiſtred. The Adminiſtration of *Ann*'s Eſtate was granted to *Urſula* and *Elizabeth*. And the *Quær.* was, If the whole 20000 *l.* were to raiſed, or any more than 12000 *l.*

*Ann*'s

*Ann* being dead before 21 years and unmarried.

*Per Cur.* The whole 20000*l.* ſhall be raiſed, for the Words of the Will are, if he had two Daughters or more.

A perſonal Eſtate is Deviſed amongſt four Children by name, and as to the real Eſtate, it was to be added to his perſonal Eſtate for all his Childrens Portions; and a fifth Child is born, the Land is to be ſold, and ſhe ſhall have a ſhare, 32 *Car.* 2. *Cole and Hancock's* Caſe. Children born to have a ſhare when born.

The Commons prayed, That an Infant within age levying a Fine may have a reſpit 2 or 3 years after his full age to reverſe the ſame.

*The King Anſwered he would be adviſed thereof.*

If an Infant of the age of 20 years, and hath Reaſon and Wiſdom to govern himſelf, Sells his Land, and with the Money thereof buyeth other Lands of greater value than the firſt was, and taketh the profits thereof; he may have his firſt Lands again in Equity, as he may at Law, for the vendition made by the Infant ought not to be ſupported, or aided by a Court of *Equity*, becauſe that the Infant is diſabled by a Maxim in the Law; and the Court of *Equity* will not give Relief againſt a Maxim, and a Maxim of the Law ought to be obſerved, to

to be of as great ſtrength as any Statute, which is framed by a Triple Aſſent. But in *Equity*, the Infant ought to be bound to repay the Money by him received, with reaſonable Coſts.

An Infant may have a Writ out of *Chancery*, to recover his Gardian, directed to the Juſtices, and to recover another, *&c.*

The King by his Letters Patents, may make a General Gardian for an Infant to anſwer for him in all Actions, or Suits brought, or to be brought in all manner of Courts, or may make 2 or 3 Gardians joyntly to anſwer for him, or to bring any Action for him; and that the ſaid Guardian may make another Guardian.

Inſpectio corporis perſon' infra ætatem.

Martis 22 die Junij Anno Regni Regis Jac' Angl' &c. Habita iſto die per Cur' hic inſpection' corporis pd' querentis videtur dicte curie hic eundem querent' infra etatem vigint' & unius Annorum modo exiſtere ſed quia dicta Cur' hic ſe adviſare vult priuſquam ad judicium in hac pte reddend' procedatur ordinat' eſt per eandem Cur' hic qd' pd' Quer' poſſit produci ad dict' Cur' hic teſtes quoſcunq; & alias probationes ad veritatem in premiſſis prob' and'.

The

The Plaintiffs were Legatees, their Legacies to be paid at 21 years of Age; they ſuggeſt they had no maintenance, and pray by Guardian, That the Defendant who is Executor of the Will may allow them maintenance. The Defendant demurred, becauſe the Plaintiffs were under age, and their Legacies were not to be paid till they were 21 years of age, and ſo had no cauſe of Sail. The Demurrer was over-ruled, *Ter. Mich.* 16 *Car.* 2. in *Cancellar. Renneſ. & Parot.*

Legatees to have Maintenance.

*Ter. Hill.* 17 & 18 *Car.* 2. in *Canc. Osburn, Baker* againſt *Shelbury*; The Bill was to be relieved againſt an Apprentice's Bond and Articles, and to have them up. Upon hearing ordered, that the Defendant do within a certain time, (*viz.* one year) bring his Action, and go to Tryal thereupon for his Damages, or in default thereof the Bond and Articles to be delivered up. And the Reaſon that was given was, That if it were at the Defendants choice to ſtay his Action as long as he pleaſed, he would ſtay till the Plaintiffs Witneſſes were dead. And it was ſaid, It was uſual in the caſe after Apprentices were out of their time, to exhibit a Bill to put their Maſter to Sue their Covenants within a certain time, or elſe to deliver up their Indentures.

A Bill to force the Maſter to Sue his Covenants on Indentures of Apprentiſhip.

*Paſch.*

A Citizen of *London* cannot Devise his Childs part over to another, in case the Child dye in minority.

*Pasch.* 23 *Car.* 2. 15*th* of *May*, *Patt and Hatton*, A Citizen and Freeman of *London*, Deviseth to his Son a gross Sum, which did exceed the customary part, and Deviseth, that if his Son dye before 21 years of age, that Sum over to another, The Question was, if the Devise over was good.

It was adjudged, and so decreed by the Lord Keeper, that the Devise over for such as was the customary part, was void; and that the Orphan dying within age, his Administrator was intituled to so much as was, the customary part, and the Surplus of that gross Sum to go to those to whom it was Devised over.

A Childs Legacy paid to the Father, who failed the payment decreed.

A Legacy of 125 *l.* was given to the Plaintiff, being but 10 years old, and at that age was paid to the Plaintiffs Father, who after died *Insolvent*. The Infant at full age sued the Executor of the Devisor for the 125 *l.*

The *Lord Keeper* held it good payment.

But was prest very much by the *Attorney General* of the ill Consequence; for the Law must be the same, if it were 1000 *l.* and extends to other Cases of the like nature, and not to Legacies only.

*Lord Keeper*, What should the Executor do?

*Attorney General*, He may take Security to repay it to the Infant, and Sue to have it paid.

*Lord*

*Lord Keeper*, It may be ſo, where a Legacy will bear the charge of a Suit, but not elſe. And he delivered his Opinion accordingly.

But the Defendant being put to prove the payment, did prove likewiſe, that the Executor took a Bond, which the Court preſt the Defendant to ſhew, whereupon the Solicitor in the Cauſe ſaid he had it not, but would produce it by the next day, but ſaid it was a Bond to the Executor to ſave him harmleſs.

*Lord Keeper*, Then he paid the Security at his own Peril.

*Churchil*, It may be it is to pay the Infant at his age.

*Lord Keeper*, I ſhall believe the worſt unleſs you ſhew the Bond, and therefore decreed the Executor to pay it, *Hill.* 26 & 27 *Car.* 2. *Holloway and Collings.*

Where Maintenance ſhall be allowed to Legatees or not.

*Leech* and *Leech*, *Hill.* 26 & 27 *Car.* 2. The Bill was by Truſtees to guide and direct them in divers Truſts, and to protect them executing the ſame, which the Court did (*viz.*) The Father made a Leaſe in Truſt with Reference to his Will, and thereby Deviſed to ſeveral of his Daughters 500 *l.* to each, to be paid at 21 years, or Marriage; and if any, or all dyed before, then to others. The Daughters had no other Portion nor no Maintenance, and direction was prayed by the Truſtees, whether they might allow the Daughters Maintenance.

*Lord*

*Lord Keeper*, No, becauſe of the Deviſe over, or elſe it might have been done.

*William Lord Gray* had Iſſue *Thomas* his Eldeſt Son, and *Ralph* his Second Son; *William* their Father, for 13000 *l.* purchaſed the Manor of *Gosfield*, in the name of *Thomas* and his Heirs, and he enjoyed it, and took the Rents: And *Thomas* declared ſeveral times, That the Land was his Fathers and not his. But on the other ſide, divers ſpeeches of the Father were proved, that it was his Sons, and the Son by his Will gave the Manor to his Father. And it was decreed, that this Purchaſe was not a Truſt in *Thomas* for the Father, but an advancement by the Father to the Son. And whereas, the Father after the death of *Thomas* did convey *Gosfield*, and three other Manors in Truſt to raiſe 2000 *l.* for two other of his Grand Children, *Ralph and Charles Gosfield*, he was not liable thereunto.

Not a Truſt but an advancement to the Son.

Another Queſtion in the Caſe was, *Ralph* Father of *Ralph* and *Charles*, and of *Ford*, did make a Conveyance of *Gosfield* to Truſtees and their Heirs, to pay his Debts and Legacies, and after for performance of his Will, and at the ſame time made his Will, and thereby did Deviſe the Truſtees to pay 2000 *l.* apiece to *Ralph* and *Charles*, and ſo 6000 *l.* to *Katherin* his Daughter, the ſurplus after to his Heir *Ford*, and made his Wife Executrix, but gave not thereby in Terms the perſonal Eſtate, but only made her Executrix, and Deviſed that his ſaid three Children ſhould releaſe to his Execu-

trix

trix all ſuch Actions and Demands of his perſonal Eſtate to his Executrix. Now, whether the Executrix ſhould be lyable to the Legacies of the Children in Aid of the Heir, who had the ſurplus of *Gosfield* that was to be ſold. As to the Creditors it was agreed ſhe muſt be lyable; but as to the Children Legatees there ought to be no Aid for the Heir, for when the Legatees by the Will were to releaſe all Demands out of, or to the perſonal Eſtate, they could make no Demand out of it; which ſhews his intent, that therefore, as to the Intereſt and Legacies, the perſonal Eſtate was to be diſcharged, and the Executrix to enjoy the Eſtate free againſt them; and therefore, the Heir not to charge the Executrix as for thoſe Legacies of which he diſcharged his Executrix, eſpecially, having otherwiſe provided for their ſatisfaction, and the ſurpluſs to the Heir is expreſly after Debts and Legacies paid, therefore not before.

Againſt which it was ſaid, that regularly the perſonal Eſtate muſt Aid the Heir, and an implied intent muſt not without clear expreſſion alter the equitable general Law.

And there was other Reaſon for the Releaſe to be given (*viz.*) The Eſtate which was in the Province of *York*, was liable to the Children for Portions.

Lands Deviſed for payment of Debts and Legacies, the perſonal Eſtate ſhall be firſt applied.

The Lord Chancellor Decreed, the perſonal Eſtate to be accounted for in Aid of the Heir, in order to Aid him for what he ſhould be charged withal, not only as to the Creditors,

Creditors, but as to the Legacies charged on *Gosfield*, (*viz.*) the 6000 *l.* to the younger Children, *Hill.* 28,29. *Car.* 2.

*Ford* Lord *Gray contra Dominam Gray & al.*

*A.* Deviseth, that 300 *l.* shall be paid to the Child which he shall have at the time of his Death, and if he have none, then to his Sister. Afterwards three Children are born to him; Then by a Codicil he Deviseth 200 *l.* to each of the said Children, to be paid at their respective ages of 21 years.

The Lord Chancellor Decreed, the 300 *l.* to be Devised to the Child, &c. and tho' there be three, the Devise is not void for uncertainty, but all three Children shall have share in it; and that the Devise of 200 *l.* being without words signifying the same to be of their Portions, nor any thing one way or another to revoke or affirm the former Gift of 300 *l.* it shall be taken by way of Accumulation, and the Children shall have both Legacies, *Mich.* 29. *Car.* 2. *Pit vers. Pidgeon.*

Legacy and Accumulation.

The Father Deviseth to his Wife, Mother in Law to his Son, the custody or Tuition of his Son an Infant of 7 years old, and died. The Wife Marries meanly, (*viz.*) her own Servant; *Forster*, the Uncle of the Boy gets possession of him, and sends him into *France*, where he placed him in a Protestant Colledge for his Education.

The

The Court on Information, that the Child was eloyned by the Uncle, Sued out a Writ *de homine Replegiando*, and it was argued why the Writ ſhould not be diſcharged.

Writ *de homine replegiando.*

Lord Chancellor, Where there is a Gardian by the Common Law, this Court will intermeddle and order it. But being here Gardian by act of the party, I cannot remove him from her. But in this caſe and all other the like Caſes, they ſhall give Security not to Marry the Child *infra annos nubiles*, or conſent to be aiding to the Marriage, *poſt annos nubiles*, during minority, without acquainting this Court therewith. But I cannot reſtrain the Infant to Marry *ad annos nubiles*; and the Uncle was ordered in this caſe to ſend for the Boy home, *Mich.* 29. *Car.* 2. *Duke and Foſter.*

Guardian is named by Will, the Court will not remove him.

# PRESIDENTS

AND

# PLEADINGS

CONCERNING

# INFANTS.

# PRESIDENTS

AND

# PLEADINGS

CONCERNING

# INFANTS.

# AN APPENDIX.

## OF PRESIDENTS AND PLEADINGS CONCERNING INFANTS.

Bar per deins Age, al Det ſur Bond.

ET p̄dict J. per A.B. Attorn̄at ſuũ venit & defendit vim & injuriam, Quando, &c. Et dicit qđ p̄d N. & E. act̄onem ſuam p̄dict' verſus eum here non debeat, quia dicit qđ ipſe tempore con-

fectionis Wille ꝑdicte fuit infra etatem viginti & unius Annoꝝ. Et hoc parat est verificare, Unde petit judicium si ꝑdicti N. & E. actionem suam ꝑdictam versus eum here debeant, &c.

Replicat' & Issue, que Def. est de plein Age.

Et ꝑdict' N. & E. dicunt, Qd ipsi per aliqua ꝑallegata ab accone sua ꝑdicta inde versus ꝑdictum J. hend' ꝑcludi non debent quia dicunt qd ꝑd J. tempore confect Wille ꝑdicte fuit plene etatis viginti & unius annoꝝ, & non infra etatem ꝓout ꝑd' J. superius allegavit, Et hoc petunt quod Inquiratur ꝑ ꝓriam, Et ꝑd' J. silit, Ideo Precept est Vic, &c.

Bar al Trespas per deins age, & qd' non Narravit versus Def. per Guardianum.

Petrus C. nuper de C. in Com, &c. Attachiatus fuit ad respondend' J. R. jun de plito quare Vi & armis claus ipsius J. fregit & herbam suam ibid' crescen' ad valentiam centum solidoꝝ pedibus suis ambulando conculcavit & consumpsit, & alia enoꝝnia, &c. ad damn', &c.

Et

ET ꝑdict P. per J. A. Attornat suum venit & Def. vim & injuriam, &c. quando, &c. Et dicit quod ꝑd' J. A. (tali die & anno) in Narr' ꝑdict' superius specificat' (scil') 20 die Octob. Anno regni dom' Regis nunc quinto & die impetrationis brevis Originalis ipsius A. (scilt) die Anno septimo dicti dom' Regis nunc fuit infra etatem viginti & unius annorum; Et qd ꝑd' J. A. narravit versus ꝑd' P. C. in plito ꝑdicto per Attornat suum ubi per debitam legis formam p Sardianum sund narrasse debuit. Et hoc paratus est verificare. Unde petit Judicium.

Replicat' al deins Age, quod Mercimonia fuer' propter necessarium apparatum, & Rejoynder.

PRecludi non debet, quia dicit qd ꝑdicta Mercimonia per ꝑfat D. de eodem Querente ad requisitõ ꝑdict' Def. in forma ꝑdict empt fuer empt p necessario apparatu & vestitu corporum ꝑdict D. ac cujusdam F. adtunc uxor' ejusdem D. gradibus eorum ea requirent, Et hoc, &c.

ſſ. ET ꝑdict D. dicit, quod ꝑdca Ceremonia ꝑ ipſum in forma ꝑdict empt non empt fuer' ꝑ neceſſar' apparatu & veſtitu corporum ipſius D. & ꝑdict F. uxoris put, &c.

Vel ſic:

——— M.B. Vid Executrix, &c. J.B. por Action ſur Caſe ſur ſeveral Aſſumpſits verſus O.L. Armig, for Taylors Work, and Neceſſaries provided.

Def. plede Nonage.

ACtio non, quia dicit qd ꝑdictis ſeveralibus temporibus quibus ſeverales promiſſiones & aſſumpſion ꝑdict facte fuer ipſe idem Def. fuit infra etatem 21 annorum. Et hoc, &c. Unde, &c.

Repl.

Repl. Quod veſtimenta fuer' neceſſarium pro Def.

PRecludi non, quia dicit Qd ꝑdicta ſeperalia veſtimenta in Narracone ꝑd' ſuperius ſpecificat' fuer' neceſſar' & convenien' apparat & veſtit ꝑ coꝛpoꝛe ipſius Def. videlt apud London in paroch & warda ꝑdict', Et hoc, &c. Unde, &c.

Rejoynder & Iſſue.

ET ꝑdict Def. dicit', Qd ꝑdicta ſeꝑalia veſtimenta in Narracone ꝑdict' ſuperius ſpecificat' non fuer neceſſar & convenien apparat & veſtit ꝑ coꝛpoꝛe ipſius Def. modo & foꝛma ꝑout ꝑdict' Querens ſuperius replicando allegavit, Et de hoc ponit ſe ſuper patriam, &c.

Londſ.

Lond ſ. Count in Debt by Adminiſtrator upon a Bond againſt the Heirs in Gavel-kind T. W. J. W. & W. W.

The Defendants pray, that the Parol may Demur for the Infancy of one, in this Form.

ET pdict T. & W. per J. P. Attornat ſuum & pd' J. W. per pdict J. P. qui admiſſus eſt per Curiam dict' dom Regis hic ad defend p eod J. W. infra etatem exiſtent ut Gardianus ipſius W. ven & def. vim & injur quando, &c. Et idem J. dicit qd iple eſt infra etatem 21 annorum (videlt) etatis undecim annorum & octo menſium & non amplius; Et hoc paratus eſt verificare; Unde non intendit quod ipſe durant minoritate ſua pfat T. E. (Quer) in plito pdicto reſpondere debeat, &c. & petit quod loquela pdicta inde remaneat uſq; plenam etatem pdict J. W. &c. Et quia pdict T. E. (Quer) non dedicit quin pdict J. infra etatem eſt, ideo loquela pdict' remanet uſq; ad plenam etatem ipſius J. &c. Poſtea ſcilicet 4 die Junij Anno, &c. venit hic in Cur' pdict T. E. p Attornat ſuum pdict & dic qd pdict J. W. modo plene etatis exiſtit & pet hr dom Regis Vic Lond dirigend ad reſum tam pdict J. W. quam pdict T. W. & W. W.

Reſummons.

W. W. filios essendi hic auditur judic
suum de loquela p̄dict, & ei conceditur
attornat hic tres Trin, &c. ad quem diem
hic ven p̄dict T. E. per Attornat suu p̄dict.
Et Dic vidett R. B. modo mand ḡd pred' Nihil Re-
T. W. W. & J. nihil habent in balliva torn.
sua p quod resum possint. Et super hoc Testatum.
Testatum est in eadem Curia hic qd pred'
T. W. W. & J. satis hent in predict Com
Hanc' unde sum possint. Ideo precept est Resum-
Dic Mr. ḡd resum p bonos sum pred' T. mons.
W. & J. essendi hic in Octab S. Michaelis
auditur judic suum de loquela p̄dict.
Idem dies dat est plat T. E. &c. Ad quem
diem hic ven predict T. E. per Attornat
suum p̄dict, & obtulit se quarto die post
versus plat T. W. & J. de plito p̄dict &
ipi non ven. Et Dic Hanc vidett E. S.
modo mand ḡd sum fecit pred' Def. essend
hic ad hunc diem per J. S. & J. N. &c.
Super quo Precept est prefat Dic Mr. ḡd Vic' retorn'
distring plat os Def. p omnes terras, &c. Summon'.
& ḡd de exit, &c. ita quod haret corpora
corp hic in Octab Hill ad respond' prefat
T. E. de plito pred'; Et aud' judic sum
de plur defalt, &c. idem dies dat est prefat
T. E. hic, &c. Et modo hic ad hunc diem
venit ad predict Octab S. Hill ven tam pred
T. E. per Attorn suum pred' quam predict
Def. p T. S. Attornat suum. Et super hoc Def. appere.
pd' T. E. per ḡd pred' Def. ad Narr suam
pred' respondeat, &c. Et pred' Def. ut prius
Def. vim & injur' quando, &c. & pred' Def. Placit. riens
placitant riens p discent generalm̄t. per discent.

Cornub

Cognub ff. J. M. versus J. W. & S. Ux' ejus, & J. C. Et Eliz' Ux' ejus filias & heredes T. J. ged de debo sup Obligat.

Parol demur prie pur deux Infants pur Infancy del un.

ET pdict J. W. & S. ux' ejus, Et J. C. per E. S. Attornat suum, Et pdict Eliz' p A. & B. qui admiss sunt per Cur dicti dom Regis hic ad defend p ead Eliz' infra etatem existen ut Gardiani ipsius E. ven & def. vim & injur quando, &c. Et dicunt hd pdict J. M. actionem suam inde versus eos here non debeat quia protestando hd ipsi non heant aliqua terras seu tenementa p discensum hereditarium de pdict J. C. patre ipsar S. Et E. in feodo simplici nec huer' die impetracon hujs Original ipsius quer' nec unquam postea; p plito tamen ijdem def. dicunt hd pdict Eliz' est infra etatem 21 annorum (videlt) viginti annorum & non amplius. Et hoc parat sunt verificare. Unde non intendunt hd durante minori etate pdict Eliz' ijdem def. in plito pdict respondere debeant; Et petunt hd loquela pdict remad usq plenam etatem pdict Eliz'; Et quia pdict quer' non dedicit quia pdict Eliz' infra etatem exist. Ideo loquela pdicta remad

remand usq; ad plenam etatem ipsius Eliz' &c. Resummons pʒie, &c.

Count d'avoyder Recognizance pur Nonage del Conisor. B.C.

Dom̃ Rex mandat Justiciar' suis de Banco hʒe suum clausum in hec verba:

Carolus, &c. Justiciariis nostris de Banco salutem. Ex gravi Querela, &c. Et modo hic ad hunc diem scilt 25 diem Januarij Anno, &c. ven̄ hic in Curia p̄dict quer' in pʒopʒia persona sua, & dicit q̄d ipse p̄dict pʒimo die Martij Anno 36. impʒadict' apud Lond̄ in paroch, &c. cozam ilat P.P. Mil Cap' Justic' dict dom̃ Regis ad plita cozam ipso Rege tenend̄ assignat & ad capiend̄ recognitiones debitoz̄ deputato, per pʒocurationem persuasionem & illigationem dicti def. ductus fuit; & idem quer cozam pʒelat P. P. Mil cognovit seipsum debere pʒelat def. 400 l. quas ei solvisse debuit ad certum tempus in eadm̃ recogn̄ content secund̄ cozmam Statuti apud Westm̃ p recuperatione debitoz̄ edit & p̄vis, pʒout in eadem Recupac' plenius contin etur. Et idem quer ulterius dicit, q̄d ipse tempoze recognitionis p̄dict cogn̄ fuit, & adhuc est infra etatem viginti & unius annozum; Et hoc paratus est verificare; Unde pet̄ judicium, & q̄d ipse per Curiam

Curiam hic esse infra etatem 21 annor. adjudicari possit, & qd recognitio pdicta esset vacua & nullius vigoris, & qd ipse idem quer de recogn pdict p Curiam hic exoneretur: Et sciendū est qd 9 die Febr' Anno 36 supradicto ad pbandū allegationem & querelam pdict' fore veram ptulit hic in Curia testes sequentes (videlt) E. Y. R. O. & F. B.

Testimoinage produce.

Qui quidem E. Y. R. O. & F. B. dicto 9 die Febr' Anno 36 supradicto in eodem Termino coram E. A. Mil & Sociis suis Justic dicti dom Regis de Communi Banco hic super Sacram suum separatim p seipsl. onerat jurat & examinat ad veritatem de & super pmissis dicendū deposuerunt modo & forma sequen. Quarum quidem Depositionum tenor sequitur in hec verba:

Ss. Depositiones capt coram, &c. Et quia Justic hic se advisare voluit de & super pbationes pdict & quia expedions est & necesse qd pdict def. p interesse suo in hac parte pmunic foret priusquam Curia hic ulterius procedat ad recognitionem pdict adnullandū & evacuandū Precept' fuit Vic, qd Venire fac hic plac def. ad ostendendū quare recogn pdict (in forma pdict capt & recogn) rone per ipsum quer pallegat adnullari & evacuari. Et idem quer eadem rone exonerari non debeat & ulterius ad faciend & recipiend qd dicta Curia in ea parte consid, Idem dies dat est eid quer

Ven' fac' Def.

quer' hic, &c. Et super hoc ulterius dictum est p̃fato quer' q̃d tunc sit hic & secum afferat alias p̃bationes dictarum allegacionis & querele si, &c. Et modo hic ad hunc diem scilt, &c. (tali retorno) venit p̃dict quer' in ꝑpria persona sua ducens secum Librum Parochial (Anglicè the Church-Book) paroch de B. in Com S. per quem plenius liquet Curie hic q̃d ipse idem quer' baptizatus fuit apud B. p̃dict 27 die Octob 1696. Et idem Vic modo mand' q̃d p̃dict def. nil het, &c. Et super hoc idem quer' ut p̃ius dicit, q̃d ipe tempore recogn̄ p̃dict fuit & adhuc est infra etatem 21 annor. Et hoc paratus est verificare. Unde ut p̃ius pet judic & q̃d ipse per Cur̄ hic esse infra etatem 21 annorum adjudicari possit, & q̃d recognitio p̃dict evacuetur & penitus p̃ nullo heatur. Super quo quia Justiciar̄ hic tam per inspection dicti quer' quam examinacon̄ testiū & ꝑbationū p̃dictarū satis liquet & apparet ipsum quer' tempore recognitionis p̃dict fuisse & adhuc esse infra etatem 21 annor. Ideo consideratū est, q̃d recognit p̃dict p̃ p̃dict quer' p̃fat def. in forma p̃dict recognit vacua & penitus p̃ nullo heatur. In B. C.

Judgment que Recognizance ferra void.

Count

Count sur Bill Obligatory per Administratorem durante minori ætate Executoris.

J. T. nuper de, &c. als dict', &c. ad respondend' T. H. gen̄ Administratori omnium bonorum & catallorum que fuer' W. G. durante minoritate W. C. Executoris Testamenti p̄dict' W. de plito q̄d reddat ei 12 l. quas, &c. Et unde, &c. per quandam billam, &c. cognovisset se debere p̄fato W. in vita sua 6 l. solvend' eidem W. Executoribus, &c. (tali die) tunc pr' sequen' dar' Bille p̄dict' & p̄ vera solucone bene & fideliter faciend' p̄dict' J. T. obligasset se, &c. in p̄dict' 12 l. per eandem Billam. Et p̄dict' J. H. in facto dicit q̄d p̄dictus J. T. non solvit p̄fat' W. in vita sua (tali die) in Billa p̄d' superius specificat' p̄dict' 6 l. quas idem W. Executoribus, &c. ad & super p̄dictum diem solvisse debuit secundum formam & effectum Bille p̄d' p̄ quod actio accrevit p̄fato W. in vita sua ad exigend' & h̄end' de p̄dict' J. T. p̄d' 12 l. p̄d' tamen J. T. licet sepius requisitus p̄d' 12 l. p̄fato W. in vita sua seu eid' J. H. post p̄d' W. mortem (cui Administratio omnium bonor̄ & catallor̄ que fuer' p̄d' W. tempore mortis sue p̄ficium P̄rovidentia divina, &c. apud London̄ in parochia Beate Mar' de Arcub' in ward' de Cheap durante minoritate p̄dicti Walteri qui adhuc superstes

perſtes (videlt) apud D. prædict' & infra etatem exiſtit poſt mortem præd W. commiſſa fuit) non reddidit ſed ill ei reddere omnino contradixit & ill eidem J. H. adhuc reddere contradicit ac injuſte detinet; unde, &c. Et pfert, &c.

Al Count ſur Obligation ove Condition pur performance des Covenants in Indenture de Apprentiſhip.

*Bar.*

Per Stat. 5 Eliz. que nul Merchant prendra aſcun Apprentice niſi ſon pere ad terres al valure de 40 *s.* per Annum deſtre certifie ſouth les Maines & Seals de 3 Juſtices.

ſſ. ET pd Robertus per R. A. Attornat ſuum ved & Def. vim & injuriam quando, &c. & petit auditum Scripti pred & ei Legitur, &c. petit etiam auditum Conditionis ejuſdem Scripti Obligatorij & ei Legitur in hec verba.

ſſ. The Condition of this Obligation is ſuch, That if the above bounden *Robert Leigh* pay, and keep all and ſingular the Covenants, Grants, Articles, Clauſes, Proviſos, Payments, Conditions and Agreements whatſoever, which on the part and behalf of the ſaid *James Leigh* are, and ought to be obſerved,

ſerved, performed, fulfilled, accompliſhed, paid and kept, compriſed and mentioned in one pair of Indentures, bearing even date with theſe Preſents made, or expreſſed to be made between the ſaid *Robert Leigh*, and *James Leigh* of the one part, and the above named *Ann Wade*, and *Samuel Wade* of the other part, in all things according to the true intent and meaning of the ſaid Indentures, Then this preſent Obligation to be void and of none effect, or elſe to be and remain in full Power and Vertue.

Quibus lectis & auditis idem Robert dicit qd ipſe de debo pred pretextu Scripti Obligatorij pred onerari non debet quia dicit qd Indentur pred' in Condition pred ſuperius ſpecificat fact fuit apud Civitat Exon pred' in comit ejuſdem Civitatis pred' viceſimo tertio die Julij Anno Regni dicc Dom Regis nunc primo ſuprad dicto inter ipſum Robertum Leigh & pd Jacobum Leigh in Condition predicta ſuperius nominat per nomina R. L. &c. & J. L. filij ſui ex una parte & predat Annam & Samuel per nomina A. W. de civitat Exon vid & Samuel W. de civitat Exon pred' mercatorib ex altera parte cujus quidem Indenture alteram partem ſigillis ipſor Ann & Samuelis ſigillat gered dat iidem die & Anno idem R. hic in Curia profert per quam quidem Indentur' Teſtat eſſe qd predic Jacobus Leigh tam de electione ſua propria quam per & cum conſenſu patris ſui per Indentur' pred' poſuiſſet & obligaſſet ſeip-

ſum

ſum Apprenticium ad & cum predict Ann & Samuel habitare remanere & ſervire a dat Indentur' predict pro & durante Termino Septem Annorum plenarie complend' & finiend' durante omni quo tempore ipſe pdict' Jacobus Leigh per Indentur' predict convenit & promiſit ad & cum pdict Anna & Samuel ſecreta ſua conſelare mandat ſuis legitimis & honeſtis in promptu obedire & perfomare Bona ejuſdem Magiſtri & Magiſtre ſuorum non accomodare devaſtare lucare imbezillare ſeu conſumere ſed in omnibus ut vera & fideli Apprentic deceret ſeipſum erga ipſos gerere Et pdict' Anna W. & Samuel per Indentur' predict pro Bonis cauſis ipſos moven convener' & promiſer ad cum Apprenticio predict' ipſum docere & inſtruere vel ipſum doceri ſeu inſtrui cauſare, Secundum optimum modum quo potuere in arte Merchandizandi durante Termino predict, Et cauſarent & procurarent qd predict Jacobus A. reſideret in Bilboa in Regno Hiſpanie & ibidem foret educat in negotiis mercatorum ſub aliquo experto mercatore duran tribus ultimis Annis Termini predict Et inveniret & provideret pro dicto Apprene ſuo ſufficien apparat & victum & omnia al' res apt & neceſſar' tam in egritudine quam in baletudine duran Termino pdict & in fine ejuſdem relinquerent ipſum aparat in decene modo Et ipſum liberum facerent de ſocietate mercatorum (Comuniter vocat Gallica Societas) prout per In-

dene p̄dict̄ plenius liquet & apparet Que sunt omnia & singula Conventiones Concessiones Articuli & Agreament' in Indentur' p̄dict̄ contene Et idem Robertus ulterius dicit q̄d ipse die & Anno supradictis in narratione p̄dict̄ spec̄ apud Civitat̄ Exon̄ p̄dict̄ in Comitat̄ ejusdem Civitatis fecit & deliberavit eisdem And̄ & Samuel' p̄dict̄ Scriptum Obligatoriū p performacone conventionis barganie & agreament̄ in Indentur' p̄dict̄ spec̄ ex parte p̄dict̄ Jacobi Leigh performand̄ Quoque diu ante Confectionem Scripti Obligatorij p̄dict̄ & Indentur' p̄dict̄ per quendam actum in Parliamento apud Westm̄ in Comit̄ Midd̄ duodecimo die Januarij Anno Regni Dom̄ Elizabethe nuper Regine Anglie Quinto tenē edit̄ (inter alia) provisum & inactitatum fuit Authoritate ejusdem Parliamenti q̄d non liceat alicui persone inhabitand̄ in aliqua Civitat̄ sive Villa Corporat̄ utenti sive exercenti aliquod misteriorum sive Artium (Anglicè Crafts) mercatoriis negotiand̄ Anglicè Traffiquing) per commerciū (Anglicè Traffique) in aliquas partes transmarinas merceri pannarij aurifabri ferrarij (Anglicè Ironmonger) Segmentarij (Anglicè Embroyderer) sive pannularij (Anglicè Clothier) qui ponit aut poneret pannum ad confectionē & vendition̄ caperet aliquem Apprenticium aut servien̄ nisi instruct' sive doct' in aliquibus occupationum artium (Anglicè Crafts) sive misteriorum nisi talis serviens aut Apprēn-

ꝓzenticius ſit filius ſuus aut aliter quod
pater & mater talis Appꝛenticij ſive ſer-
vien̄ haberent ad tempus capc̄onis talis
Appꝛenticij vel ſervien̄ terras Tenem̄ta
ſeu alia hereditamenta clari annui valoꝛis
quadꝛaginꝫ ſolidoꝛum de ſtatu hereditario
ſive libero Tenemene ad minus koꝛe certi-
ficar' ſub manibus & ſigillis trium juſti-
ciaroꝝ̄ ad pacem Com̄ vel Civitat' ubi
hujuſmodi terre Tenementa ſeu heredita-
tum jacent ſeu jacerent Majoꝛi Ballivis
aut aliis Capital' Officiar' talis Civitat'
ſive Ville Coꝛpoꝛat' Et koꝛe irrotular' inter
recoꝛda ibidem Et ulterius per eundem
actum inactitat' fuit per authoꝛitatem
ejusdem Parliamenc̄ Quod omnes Inden-
tur' conventioñ ꝓmiſſioñ & barganie de
aut ꝓo retentione capc̄one ſive cuſtod' ali-
cujus Appꝛenc̄ aliter t̄ impoſterū fien̄
aut capien̄ quam per Stat' p̄d̄ Limitatur
oꝛdinatur Et appunctuatur penitus va-
cue koꝛent in Lege ad omnes intenc̄ones
& ꝓpoſit' put per eundem actum (inter
alia) plenius liquet & apparet. Et idem
Robertus in facto dicit q̄d̄ p̄dict' Civitas
Exon̄ in Indenc̄ p̄dict' ſuperius ſpec' eſt
& tempoꝛe confectioñ Indenc̄ p̄dict' nec
non a tempoꝛe cujus contrar' memoꝛia
hominum non exiſtit fuit antiqua civitas
Incoꝛpoꝛat' Et q̄d̄ quidam Jacobus Wal-
ker Arm̄ tempoꝛe confectionis Indentur'
p̄dict' & capc̄onis Appꝛenc̄ p̄dict' fuit ma-
joꝛ p̄dict' Civitat' Exon̄ ſcilicet apud Civit'
Exon̄ p̄dict' in comit' ejusdem Civitatis
ac quidam Michael Pyne Benjaminus

Ivey Rogerus Mallock & Thomas Boyland adtunc & ibidem fuer' Ballivi ejusdem Civitatis Qdque ꝑdict Anna Ward & Samuel ꝑdict tempore confectionis Indenture ꝑdict ac retenc̃on & capc̃on Appnticij ꝑd' Inhitabant & adhuc inhabitant infra Civitat Exon ꝑdict & adtunc & ibiꝺ utebantur & exercebant & adhuc utuntur & exercent misterium & artem mercatoris negotiand per commercium & negociation apud Bilboa in partibus transmarin &c. scilicet apud Civie Exon in comie ejusdem Civitat Qdque ꝑdict Jacobus L. Appzenticius adtunc & ibidem fuit filius ꝑdict Roberti Leigh & Marie uxor ejus patris & matris ipsius Jacobi Leigh & non filius Anne W. & Samuelis vel eorum alicujus Qdque nunquam certificat fuit sub manibus & sigillis aliquorum Justic ad pacem Dom Regis conservand assign Majori Ballis sive al Capitat Officiariis ꝑdict seu eorum alicui qꝺ pater & mater ꝑdict Jacobi huer' Terras Tenementa seu al Hereditamene clari annui valoris quadraginl solidorum de Stat Hereditario sive libro Tenement Qdque aliqua talis certificat nunquam irrotulat' fuit inter recorꝺ Civitat ꝑdict ibidem Secundum formam Statut in huiusmodi casu edit & provis. Et sic idem Johes dicit qꝺ Indentur ꝑdicta ac clausule & convenc̃on ꝑdict in eadem content & spec fuer' & sunt per retenc̃on capc̃on & custoꝺ Appzenticij aliter & alio modo quam per

Stat

Stat̃ p̃dict̃ limitatur ordinatur & appunctuatur per quod Indentur' p̃dict̃ hic in Curia prolat̃ ac in Narratione p̃dict̃ superius spec̃ ac omnes & singule conventiones clausule concessiones articuli & agreemenc̃ in eadem content' mencionat̃ specificat̃ & comprizat̃ nec non predict̃ Scriptum Obligatorium in forma p̃dict̃ occasione p̃dict̃ deliberat̃ pro performatione conventionis p̃dict' vigore Statuti predict' in huñodi casu edit̃ & provis. penitus vacue & nullius vigoris sive validitatis in Lege devener' & existunt. Et hoc idem A. paratus est verificare. Unde petit judicium si ipse de debo p̃dict̃ virtute Scripti Obligatorij p̃dict' onerari debeat, &c.

Narr' versus Apprenticium qui decessit è Servitio Magistri sui illicitè sine licentia sua & seipsum abstinuit à Servitio suo per 3 annos & recusavit servire quer' pro residuo Termini.

Lond ss. MEmorand qd alias scilicet Termino Scī Michaelis ule pdict coram Dom Rege apud Westm venit B. A. per R. J. Attorn suum Et protulit hic in curia dicti Dom Regis tunc ibidem quandam billam suam versus C. T. in custod Marr', &c. de placito convencon frace Et sunt plegij de prosequend scilt Johes Doe & Ricus Roe Que quidem billa sequitur in hec verba.

Lond ss. B. A. queritur de C. T. in custod marr maresh Dom Regis coram ipso rege existen de placito convencon frace pro eo videlicet qd cum Civitas Lond est Antiqua Civit in qua quidem Civitate hetur & a tempore cujus contrar' memoria hominum non existit habebatur quedam consuetudo usitat & approbat in eadem videlicet qd si aliqua psona existen Libere conditionis & etatis quatuordecim Annorū & ultra & infra etatem viginti & unius Annorū & non maritat seipsum posuerit Apprenticium alicui civi & libero homini Civitat pdict aliqua arte misterio sive manuali occupa-

Custom de London.

tione

tione ibidem uteñ per Indentur' inter hujulmodi Appzentic' & hujulmodi civem & liberum hominem confect' pzo Termino leptem Annozñ incipiend a die dac' Indenture p̃dict' ad artem hujulmodi civis & Liberi hominis erudiend & lecum moze Appzenticij commozand pzo p̃dict' Termino leptem Annozñ ac per J. hujulmodi Indentur' conveniret cum magiltro luo ad delerviend' eidem magiltro luo moze Appzenticij durante hujulmodi Termino in hujulmodi Indentur' lpecificat' Ac li talis Appzenticius per Indentur' luam p̃dict' conveniret cum p̃dict' magr̃o luo q̃d iple fideliter delerviret dicto magr̃o luo lecreta lua celaret pzecepta lua ubi-ꝙ faceret Damñ dicto Magiltro luo non faceret nec ab aliis fieri viderit quin illud pzo polle luo impediret vel ltatim dicto magr̃o luo pzemonitionñ daret bona magr̃i lui non devaltaret nec ea alicui illicitñ accomodaret fornicationem non committeret nec matrimonium contraheret infra terminum p̃dict' ad Chartas Pictas Aleas (Anglicè Dice,) Tabulas Lulozias, (Anglicè Tables,) vel aliqua alia joca illicita non Luderet per quod magiller luus p̃dict' aliquod Damñ heret cum bonis luis pzopziis vel alienis durante Termino p̃dict' line Licentia magilri lui p̃dict' nec emeret nec venderet Tabernas vel domñ Lulozias (Anglicè Playhoules) non frequentaret nec le a dicti lui magr̃i lervitio die live nocte illicite abltineret led in omnibus tanquam fidelis Appzenticius

us

ius se gereret erga magrm̃ suum & omnes
suos durante Termino p̃dict̃ in hujusmodi
Indentur' specificat Ac si talis magister
per hujusmodi Indentur' conveniret cum
tali Apprenticio suo ad docend & instruend
eundem Apprenticium in eadem arte qua
tunc utebatur optimo modo quo posset
doceret & instrueret invenien dicto Ap-
prenticio cibum potum apparat lecturam
& omnia alia necessar' Secundum consue-
tudinem Civit' predict per totum predict'
Terminum in hujusmodi Indentur' men-
conat quod tunc talis Apprenticius p̃o
consider p̃dict teneretur & obligaretur &
a toto tempore supradict' cujus contrar
memoria hominum non existit teneri &
obligari usus fuit & consuevit ad hujus-
modi magrm̃ suum more Apprenticij sui
deservien p Termino in Indentura illa
menconat & ad performand alias Con-
vencones p̃dict in Indentur̃ p̃dict mencon-
nat ex parte sua performand Et si talis
Apprenticius in contrarium faceret & du-
rante dicto Termino Annor̃ in Indent̃
p̃dict specificat infringeret aliquas Con-
vencones in hujusmodi Indentur' speci-
ficat' qd̃ tunc magister talis haret & here
consuevit & debuit tale remedium versus
hujusmodi Apprenticium suum per acc̃o-
nem de Convencone fract' p̃o fractione
seu non performac̃one hujusmodi Conven-
conis qualis haret seu here potuisset ver-
sus eundem Apprenticiu̇m si talis Appren-
ticius tempore confectionis Indentur' p̃d
fuer plene etatis viginti & unius Anno-
rum

cum & amplius. Et idem B. ulterius dicit qd̄ p̄dict' consuetudo & omnes alie consuetudines Civitat' London' p̄dict' in eadem Civitat' diu usitat' Auth'itate Parliamenti Domini Rich' nuper Regis Anglie post conquestum secundi apud Westm' in Com' Midd' Anno Regni sui Septimo Majori & Civitat' & Communitus dict' Civitat' & successoribus suis ratificat' & confirmat' fuere Et idem B. ulterius dicit qd̄ p̄dict' T. C. modo Def. existen' etatis quatuordecim Annorū & amplius & Libere Conditionis ac existen' infra etatem viginti & unius Annorum ac non maritat' nono die Febr'arij Anno Dom' Millimo ccc.mo quinquagesimo octavo quod Lond' p̄dict' videlicet in Parroch' beate Marie de Arcubus in Warda de Cheap Secund' consuetud' Civitat' p̄dict' per quandam Indentur' adtunc & ibidem fact' inter p̄dict' B. per nomen B. A. civis & mercatoris Scissor' Lond' ex una parte & p̄dict' T. per nomen T. T. filij R. T. de Downton in Comit' Wiltes clerici ex altera parte cujus quidem Indentur' alteram partem sigillo ipsius T. sigillat' idem B. hic in curia profert cujus dat' est iisdem die & anno posuit seipsum Apprenticium p̄fat' B. ad artem ejus erudiend' & secum more Apprenticij a die dat' Indentur' p̄dict' usq; plenum finem & Termin' septem Annorum extunc p'x' sequend' plenarie complend' & finiend' deserviend' durante quo Termino p̄dict' Apprenticius per Indentur'

tuꝛ ꝓdict' conbenit cum ꝓfat' magrō suo qđ iple ꝓfat magrum suum fideliter ser-viret secreta sua celaret ꝓcepta sua Legitima ubique faceret damnum ꝓ-fat magrō suo non facere nec ab aliis fieri videret quin ille ꝓꝛo posse suo im-pediret & statim magrō suo ꝓdicē ꝓ-moneret bona magrd sui non devastaret nec ea illicite alicui accomodaret Foꝛni-cationem non committeret nec Matrimo-nium contraheret infra Termin ꝓdict ad Pictas Chartas aleas (Anglicè voc' Dice) Tabulas Luloꝛias (Anglicè Tables) vel aliqua alia joca illicita non Luderet per qđ dictus magister suus aliquod Damnum heret cum bonis suis ꝓꝛopꝛiis vel alienis duran Termino ꝓdicē Sine Li-centia ꝓdict' magrd sui non emeret nec venderet Tabernas vel Luloꝛias domos non frequentaret nec seipsum a seꝛvitio dicti magrd sui die seu nocte illicite ab-stineret sed in omnibus tanquam fidelis Appꝛenticius seipsum gereret erga dictū magrum suum & omnes suos durante ꝓdict' Termino Et ꝓdicē magister con-venit per Indentur' ꝓdicē cum ꝓfat Appꝛenticio suo qđ iple dicē Appꝛenti-cium suum in eadem arte qua tunc utebatur optimo modo quo possit doceret & instrueret invenien dicto Appꝛenticio suo cibum potum apparatum lectum & omnia alia necessar' secundum consuetud Civitat London durante Termino ꝓdicē & ꝓ vera perfoꝛmacone omnium & singulorum conbencon & agreeamenc ꝓd

alteru-

alteruter partium ꝓdict' obligabat se alterioꝛum per Indentur ꝓdict put per eandē plenius liquet & apparet. Et ꝓdict B. ulterius dicit qꝺ ipse tempoꝛe confectionis Indentur ꝓdict & continue postea hucusque fuit & adhuc exitit liber homo Civitat ꝓdict ac Inhabitans infra libtatem eiusdem Civitat a tempoꝛe confectionis Indentur ꝓdict hucusque videlicet in Parochia Warda ꝓdict ac per totum tempus ꝓdict artem scissoꝛis (Anglicè Taylor) ibidem usus fuit Ac idem B. ulterius dicit qꝺ licet ipse bene & fideliter servavit perfoꝛmavit perimplevit & custodivit omnes & singulas conventiones Et agreeamenta in Indentur' ꝓdict' superius specificat ex parte ipius B. perfoꝛmand' perimplend & custodiend secund foꝛmā & effectum Indentur' ꝓdict' ꝓdictus tamen C. post confection Indentur ꝓdict & ante finem Termini 7 Annoꝛum scilicet sexto die Septembꝛis Anno Regni Dom Claroli Secundi nunc Regis (Angle, &c.) Decimo quinto apud Land ꝓdict in Paroch & Warda ꝓdict decessit (Anglicè did depart) a servitio ipius B. illicite & sine Licentia & contra voluntatē ꝓdict' B. & ab eoꝺ sexto die Decembꝛis Anno supꝛadict' usque finem ꝓd' Termini 7 Annoꝛum in Indentur' ꝓdict superius mencionat ꝓdict C. seipsum abstinuit a servitio ꝓdict B. Et recusavit servire ꝓdict B. magrō suo ꝓ residuo Termini 7 Annoꝛum secund Tenoꝛem & effectum Indentur' ꝓdict' sicque ꝓdict B.

dicit

dicit qd̄ Licet lepius requisit, &c. conventionem suam ꝓdict de eo qd̄ ipse idem C. Secundum morem Apprenticii pretat B. serviret a die dat Indenturæ ꝓdict ad mensum finem & c. minum 7 Annoꝝ nec leplum a dicto agri sui servitio die venerit licite & ineret non venit sed infregit & ill. remere omnino contradixit & adhuc contradicit Ad damnum ipsius B. ducentar libarum Et inde ꝓduc testam, &c.

Barr'

Protestando qd̄ non est talis Consuetudo prout, &c. nec qd̄ ipse decessit a quer' prout, &c. pro placito qd̄ Def. obtulit servire Quer' durante Termino & quer' recusavit ipsum recipere absque hoc qd̄ ipse recusavit servire quer' prout, &c.

Et idem C. dic qd̄ ꝓdict B. actio non quia protestando qd̄ in Civitate Lond̄ ꝓdict non fuit nec a tempore cujus contrar memoria hominꝫ non existit debatus talis consuetudo sicut ꝑ ꝓdict B. allegat & approbat in eadem qua ꝓdict B. per narrationem suam ꝓdict superius supponit protestando etiam qd̄ idem C. non decessit a servitio dict B. prout idem B. superius allegavit pro placito idem C. dicit qd̄ ipse obtulit seruum servire dicto B. magro suo durante Termino Annoꝝ in Indentur'

dentur' ꝑdict superius specificat Secund formam & effectū Indenture illius Quæ ꝑdict B. eundem C. in servitio suo recipere penitus recusavit absque hoc qđ idem C. recusavit servire ꝑdict B. magrō suo ꝓ Resid Termini Septem Annorū Secund tenorem & effectū Indenture ꝑ put ꝑdict B. superius inde narrando allegavit Et hoc paratus est verificare unde petit judicium, &c.

Demurrer general ad hoc plitum, Trin. 22 Car. 2. Rot. 1559.

THE

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